

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES
COURT OF APPEAL - IN CAUSE NO. 22 OF 1969

BETWEEN: ALEXANDER BARTON

Plaintiff (Appellant)

AND: ALEXANDER EWAN ARMSTRONG
GEORGE ARMSTRONG & SON PTY. LIMITED
FINLAYSIDE PTY. LIMITED
SOUTHERN TABLELANDS FINANCE CO. PTY. LTD.
GOULBURN ACCEPTANCE PTY. LIMITED
A.E. ARMSTRONG PTY. LIMITED
LANDMARK (QUEENSLAND) PTY. LIMITED (In
Liquidation)
PARADISE WATERS (SALES) PTY. LIMITED
PARADISE WATERS LIMITED
GOONDOO PTY. LIMITED
LANDMARK HOME UNITS PTY. LIMITED
LANDMARK FINANCE PTY. LIMITED
LANDMARK HOUSING & DEVELOPMENT PTY. LTD.
LANDMARK CORPORATION LIMITED
CLARE BARTON
TERRENCE BARTON
AGOSTON GONCZE
JOHN OSBORNE BOVILL
HOME HOLDINGS PTY. LIMITED
ALLEGART PTY. LIMITED
ALLEGART INVESTMENTS PTY. LIMITED

Defendants (Respondents)

APPEAL BOOK

VOLUME 11

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(1st to 6th Defendants)

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44 Martin Place,
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IN THE PRIVY COUNCIL

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Term No. 22 of 1969

CORAM: JACOBS, J.A.
MASON, J.A.
TAYLOR, A-J.A.

BARTON v. ARMSTRONG
EIGHTH DAY: TUESDAY, 2ND MARCH, 1971

JACOBS, J.A.: Mr. Gruzman, the court has been considering this question of your projected challenge to the credibility of the witnesses in connection with the alleged statement of Mr. Hume on the 11th January. I can say now that having read the evidence (and the other members of the court agree with me) and having read his Honour's findings on credibility, having realised that he saw the police witnesses and in conjunction with that relied on the failure to call other persons who would have seen that statement, that this court has no intention of acceding to an argument that the statement subsisted. I do not propose to stop you in your address. We have examined the evidence. You can carry out a detailed examination. It is so crystal clear that it falls within the relevant principles about not interfering with the conclusion of the trial Judge, that the court does not propose to interfere. If it is in error then it can be corrected. 10 20

MR. GRUZMAN: If your Honours are in error..

JACOBS, J.A.: If the Court is in error, that can be corrected. 30

MR. GRUZMAN: We have come here to exercise a statutory right, and each of your Honours has a statutory duty, and that duty, with very great respect, is not fulfilled by making a decision without hearing submissions from counsel. This is a Court of Appeal.

JACOBS, J.A.: That is not what the cases say. We have a statutory duty to deal with this appeal by way of re-hearing. The principles governing that are well established, namely that where a question depends on the credibility of witnesses in the lower Court the legal duty of this Court is not to interfere with the views on credibility accepted by the Judge of first instance. 40

MR. GRUZMAN: With great respect your Honour is wrong. That is not the law and as far as I know never has been the law, neither in England nor in Australia, and not in the Full Court of this State and not in the High Court of Australia. 50

JACOBS, J.A.: We had better deal with this matter if you say it is not the law. We will deal with the law now on this point and rule on it.

MR. GRUZMAN: I must say that we of course are naturally deeply concerned that your Honour the presiding Judge here should have made a statement of that kind without having heard counsel's submissions at all.

JACOBS, J.A.: You had better go on to these legal submissions. If I am wrong in my view that this Court will accept the findings on credibility of the Judge of first instance, who has the enormous advantage - it would be impudent of a higher Court to decide that it could decide the credibility of witnesses better than a Judge of first instance. If you say it is the law that this Court can interfere, you should proceed to argue that law. 10

MR. GRUZMAN: Not only can but should. Secondly -

JACOBS, J.A.: Would you go on to argue this aspect of the law. 20

MR. GRUZMAN: Would your Honours please allow me to make some submissions.

JACOBS, J.A.: Especially on the law governing the attitude we should take to interfering with the findings of a Judge on credibility.

MR. GRUZMAN: I will come to that. The first point is whether the Court is even correct in supposing that it is necessary to interfere with findings of credibility by the learned trial Judge. That is the first point as to which the Court has not heard any submission whatever and has simply made up its mind on some impression. 30

JACOBS, J.A.: You should not speak in those terms, Mr. Gruzman. This Court has been respectful to you, so you be respectful to it.

MR. GRUZMAN: I have been most respectful to this Court and will continue to do so.

It is our submission that your Honours have made a statement this morning after a consideration based on what we would submit can only be an impression of the printed evidence, and without having heard the submissions by counsel as to the significance of the evidence or the principles governing it. Your Honours have even decided firstly without hearing counsel that a question of credibility is involved, and secondly without hearing counsel that this Court has no power to interfere if a question of credibility is involved. 40

JACOBS, J.A.: We are allowing you to argue that matter. I wish you would proceed to the argument that if the Court is wrong in what it understands to 50

to be its duty in regard to not interfering with findings of Judges of first instance on credibility of the witnesses - I wish you would proceed with that argument. That is to the effect that it does not depend on credibility, according to your submission, then the Court will hear you on that, although it is a remarkable submission in view of the fact that Mr. Barton swore that there was a statement, and Sergeant Wild swore that there never had been such a statement. Both witnesses were in the box before the trial Judge and he accepted Sergeant Wild. To say that there was no issue of credibility is, to say the least, a remarkable submission. 10

MR. GRUZMAN: Sergeant Wild and Constable Follington and Mr. Hume all swore that there was no such document in existence ever. The primary point is did his Honour decide it on credibility, and secondly, even if he did, does that remove the obligation of this Court, if invited to do so, to consider the question? 20

TAYLOR, A-J.A.: It seems to be your impression you have a right to be heard on anything at any time. That is not my view of the function of counsel in this Court or any other Court. You do not get that right by merely asserting it. If it is plain to me that this was a finding on credibility, and it is plain because his Honour said so, he said he preferred the evidence of the police, with their diaries, to that of Mr. Barton, who did not call his son, who was supposed to have seen it. That to me is crystal clear a finding on credibility. It is crystal clear to my brothers a finding on credibility. In my view you should not put arguments to us. 30

MR. GRUZMAN: If that is right, there would never be any point in coming to the Court. The Judge would go through the evidence and say "I do not want to hear any arguments on this. It is quite plain to me". That is not the legal system as I understand it. 40

TAYLOR, A-J.A.: A Judge has never been bound to hear arguments from counsel unless he thinks they are going to be of some assistance.

MR. GRUZMAN: A Judge does not know until he has heard them.

TAYLOR, A-J.A.: There have been many arguments that have been put to this Court since your case started that have not advanced this case.

MR. GRUZMAN: I do not want to enter into an argument with your Honour. If ever there was a case which required a withholding of judgment until the whole of the evidence had been considered, it was this case. 50

TAYLOR, A-J.A.: I do not agree. This is a plain case that went on for 40 days and then 14 days of

addresses on what was basically an issue of fact which involved credibility above all others.

MR. GRUZMAN: And credibility found entirely in favour of Mr. Barton. Mr. Barton's credit was entirely upheld. His Honour Street, J. found Barton was an honest truthful witness.

TAYLOR, A-J.A.: As far as I am concerned you can keep on saying it every day, and I do not accept it. His Honour made a very qualified finding about Barton. On this issue he refrained from saying he did not believe him. I myself accept the view that this statement was never made. I am completely satisfied it was never made. What conclusion do you draw of a man who goes into the witness box and swears it was made?

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MR. GRUZMAN: What your Honour Taylor J. has done is take an impression of the evidence and form what I would respectfully submit is an uninformed view, and then has allowed that to colour most of the statements, and I say it with great respect, that your Honour has made from the Bench from the time the case started, without ever hearing counsel's submissions. That in our submission is a denial of the rights of a party coming before a Court. A party is entitled to come before a Judge whose mind is open and receptive of argument and after argument it is for the Judge to decide. A party cannot be denied the right to an open minded hearing. In our submission your Honour Taylor J. formed a view without ever hearing any submission. In our submission that is wrong.

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TAYLOR, A-J.A.: I do not propose to debate the matter with you Mr. Gruzman. There are points in this appeal I think are of importance and that will deserve argument. I have not heard it yet.

JACOBS, J.A.: You say you do not challenge the credit of Sergeant Wild; is that so, Mr. Gruzman?

MR. GRUZMAN: I did not say that.

JACOBS, J.A.: I frankly do not understand the argument you were putting to me previously that it did not depend on credibility.

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MR. GRUZMAN: One of the reasons is that his Honour did not put it on credibility. His Honour the trial Judge did not put it on reasons of credibility. I will refer to the law first. His Honour stated "I have grave doubts about the credibility of Sergeant Wild".

MASON, J.A.: Did he use those words "grave doubts about the credibility"? I think it is important to be accurate.

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MR. GRUZMAN: There are several passages he referred to it.

JACOBS, J.A.: He said Sergeant Wild impressed him in the witness box.

MR. GRUZMAN: He did not say how.

MASON, J.A.: He did say that one consideration inevitably casts a shadow over his credit in general.

MR. GRUZMAN: He said "Sergeant Wild as well as bearing the character of a competent police officer impressed me in the witness box". What his Honour meant there was he seemed to be a competent police officer.

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TAYLOR, A-J.A.: In the witness box.

MASON, J.A.: He said "as well as bearing the character of a competent police officer, impressed me".

MR. GRUZMAN: "Impressed me as such in the witness box". It is the whole point of his Honour's criticism. He said here was a competent police officer. This was the fact. 28 years experience. One of the senior men in the police force at that time. That is one of the submissions we made. Then he said "I have great difficulty in accepting his claim to have been as dilatory and offhand in his conduct of this investigation as his evidence suggests, and this inevitably casts a shadow over his credit in general. It is difficult to avoid the impression that he must have done more than his evidence suggests." In other words he was telling lies. "But this of itself will not justify an affirmative finding that he obtained a statement from Mr. Hume nor will it justify a finding that he yielded to pressure from Mr. Armstrong".

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There is another statement. He says that the plaintiff had not proved the existence of this statement. In terms he says "In evaluating the whole body of evidence on this disputed topic I regard the absence of evidence from Mr. Barton Jnr. (a boy of 20 years at that stage) as important and I decline to find in Mr. Barton's favour that such a statement existed. Before passing from the part played by Sergeant Wild and Constable Follington I should mention in the course of cross-examination each was attacked on a number of grounds. They of course are not on trial in this suit, although their credit is in issue. I do not regard it as necessary or even desirable that I depart from a consideration of the matters decisive of success or failure in this suit in order to deal with the various charges made against Sergeant Wild and Constable Follington. On their own account their inactivity and complacency in connection with a complaint of a most serious nature is deserving of censure. Mr. Barton was entitled to have his complaint properly investigated. It was undoubtedly genuine so far as it concerned Vojinovic and, as I shall mention later, the painstaking efforts of Mr. Barton's legal advisers in this case elicited sufficient evidence to establish

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that Mr. Hume was involved in the latter part of 1966 in some activity adverse to Mr. Barton."

I have said enough there to show what happened was this - although we challenge some of the findings of the learned trial Judge, each one of us who was involved in that case can only be grateful to his Honour for the judgment in which his Honour brought order and reason to a great mass of evidence. That is not to say that we accept that everything his Honour said was correct. 10
Vast areas of his Honour's judgment we do accept. There are some matters in respect of which we submit his Honour was wrong. Take the very point. I ask rhetorically was it right for his Honour to say "These people were attacked in cross-examination"? I will establish to your Honours that Follington and Wild lied and lied, and lied again.

JACOBS, J.A.: His Honour made no such findings, having seen them there.

MR. GRUZMAN: His Honour went further. His Honour said "These attacks were made. I do not regard it as necessary to make any decision at all on those matters". 20

JACOBS, J.A.: I do not read his Honour's reasons that way.

MR. GRUZMAN: That is what his Honour said.

TAYLOR, A-J.A.: You say that, but we are entitled to make up our own minds what his Honour said. We do not have to take what you say.

MR. GRUZMAN: I am reading his Honour's judgment. 30

TAYLOR, A-J.A.: Would you mind making submissions and not thrusting things at us, or at me. "I will convince your Honours". You can make submissions. You are not entitled to say that you will convince me. There is a language.

MR. GRUZMAN: I am well aware of it.

TAYLOR, A-J.A.: I would have thought you were completely ignorant of it.

MR. GRUZMAN: I am also aware of other matters. What his Honour said was "before passing from the parts 40
played by Sergeant Wild and Constable Follington in events relevant to the suit, I should mention in the course of cross-examination each was attached on a number of grounds". What his Honour goes on to say is "I won't make a finding on those matters". He says so in terms. "They of course are not on trial in this suit, although their credit is in issue. I do not regard it as necessary or even desirable that I depart from a consideration of the matters decisive of success or failure in this suit 50
in order to deal with the various charges made against Sergeant Wild and Constable Follington".

JACOBS, J.A.: Would you read page 3179 line 10.

MR. GRUZMAN: "The matter ultimately comes down to a simple question of fact to be determined in the light of the views I have formed regarding the credit of the various witnesses concerned".

JACOBS, J.A.: Do you accept that finding of his Honour?

MR. GRUZMAN: No your Honour.

JACOBS, J.A.: Do you still say that he did not approach it through the credit of the witnesses concerned? 10

MR. GRUZMAN: I do.

JACOBS, J.A.: His Honour said he did a thing, and he did not do it?

MR. GRUZMAN: What his Honour did -

JACOBS, J.A.: I simply do not understand you. Mr. Justice Street says there quite distinctly "The matter comes down (that is to say the existence of this statement on the 11th January) to a simple question of fact" to be determined in the light of the views that he, Mr. Justice Street, had formed regarding the credit of the various witnesses concerned. You say although his Honour thought he was doing that, he was not in fact doing it? 20

MR. GRUZMAN: In the next sentence his Honour explains what he meant.

TAYLOR, A-J.A.: What about reading the one that starts "Not only is there a great volume of evidence directed to the credit of Sergeant Wild, Constable Follington, but in addition the significance of this evidence has been carefully and thoroughly analysed by both counsel in their addresses." Did you do that or not? 30

MR. GRUZMAN: Certainly.

TAYLOR, A-J.A.: Analyse the evidence on credit?

MR. GRUZMAN: Yes. His Honour then says "The matter ultimately comes down to a simple question of fact to be determined in the light of the views I have formed regarding the credit of the various witnesses concerned. It is Mr. Barton who asserts that he saw the Hume statement and who seeks to have me find that there was such a statement. He accordingly bears the onus of proof". His Honour does not say, "I do not believe Mr. Barton". He says "This is a Court of law and one side bears the onus. If I cannot decide, then the party who bears the onus loses the point". 40

JACOBS, J.A.: That would involve reaching a conclusion on the credit of the various witnesses.

MR. GRUZMAN: Not necessarily, as the House of Lords said.

JACOBS, J.A.: Is his Honour in error in stating that is what he is doing?

MR. GRUZMAN: His Honour goes on to say the evidence is in such a state.

JACOBS, J.A.: "The matter ultimately comes down to a simple question of fact to be determined in the light of the views I have formed regarding the credit of the various witnesses concerned".

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MR. GRUZMAN: It is consistent with that that his Honour says "Mr. Barton is an honest witness. I have doubt about the police witnesses. It is an onus of proof point". It involved the destruction of police evidence, conspiracy, perjury. There was a tremendous amount involved in this. We are going to seek to convince your Honours what the finding could be. His Honour says "Although I know Mr. Barton is an honest witness".

MASON, J.A.: Why don't you use the expression "Mr. Barton's evidence is suspect"? That is what his Honour said.

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MR. GRUZMAN: Not that the witness was suspect.

MASON, J.A.: The evidence was suspect.

TAYLOR, A-J.A.: Testimony.

MR. GRUZMAN: There is a tremendous difference.

MASON, J.A.: I know there is. That is why I asked you to use the words in the judgment.

MR. GRUZMAN: I am conveying what his Honour says. It is the same as if you asked someone "What did you have for breakfast this morning?" and he says "I had fried eggs", and in fact it turned out he had sausages. He may be a perfectly honest witness but his evidence on that point may be suspect. It might be mistaken.

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TAYLOR, A-J.A.: He is an honest witness but his evidence is untrue.

MR. GRUZMAN: That is right. That is the phrase that his Honour Street, J. used about Mr. Barton. "He is an honest man doing his best to give an honest account. In some respects he is wrong. Therefore I have to look at his evidence. But he is an honest man". "In the light of the views I have formed regarding the credit of the various witnesses, I have Mr. Barton, an honest man, who may be mistaken. I have Wild and Follington. They have been attacked. On the whole I do not think this is a critical matter" is what his Honour says.

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MASON, J.A.: I do not for my part understand your present submission. Is it you are endeavouring to draw a distinction between the evaluation of witnesses based on material as throwing light upon their credit?

MR. GRUZMAN: I am not seeking to draw that distinction. His Honour's finding was based on seeing Mr. Barton there for months in court, cross-examined for days. He says "I am dealing with an honest man". On the other hand he says the most honest of people can be mistaken. Mr. Barton is no different to anyone else. "Therefore, while I accept 90% of what Mr. Barton says as both truthful and accurate, my opinion is that in some cases he is wrong even though he is doing his best". That is exactly what his Honour found of Mr. Barton. It is quite different from what he found of Armstrong and Hume.

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When we come to the police his Honour said "I do not think that what I find about the police is going to be critical in this case at all. Therefore I am not going to make a finding." He says as to the Hume statement "It is not so important that I should really go into it". He said "When one considers -

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TAYLOR, A-J.A.: Are you saying his Honour did not go into the question of whether or not the Hume statement existed?

MR. GRUZMAN: The proper evaluation of the evidence to decide that matter, his Honour in our view did not go into because in order to do so his Honour had to make - if I might address your Honour Mason J. on the matter of suspect. May I read to your Honour the passage on his Honour's judgment where that is dealt with. That is at the top of page 3116: "He believes in the truth and justice of his case, but that belief is self-induced rather than being based on fact. His evidence must accordingly be regarded as suspect". That is what his Honour says. "Here is an honest man who to some extent by reason of the events which have occurred has caused himself to honestly believe certain things which I do not accept".

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TAYLOR, A-J.A.: Which are not founded on fact.

MR. GRUZMAN: That is right.

TAYLOR, A-J.A.: Every time you look at his evidence you look at it on the basis it is something he induced himself to believe and not based on fact.

MR. GRUZMAN: That is true. We were dealing with Mr. Barton as a man.

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JACOBS, J.A.: No. As a witness.

MR. GRUZMAN: As an honest witness.

JACOBS, J.A.: Credibility is the test of a witness.

MR. GRUZMAN: The first test of a witness is, is he an honest witness. On that he gets 100%. The next question is, does this honest witness in every case - is his memory so accurate - is there difficulty of recollection or possible reconstruction of some matters entering into it so that he honestly says something which turns out to be not the fact?

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TAYLOR, A-J.A.: Then his credit is no good.

MR. GRUZMAN: Not at all.

TAYLOR, A-J.A.: Credit is what you give to his evidence.

MR. GRUZMAN: With respect that is not as we would submit. He gets 100% for honesty and 90% for accuracy.

JACOBS, J.A.: Credit in the witness box is not his character or reputation except so far as that affects whether one can accept what he says as accurate.

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MR. GRUZMAN: There are two points. The first question a Judge always asks himself is who at least is trying to tell the truth. On that Barton gets 100%. The second question is does he succeed. On that Barton gets 90%.

MASON, J.A.: I think we are wasting a lot of time on this. As the learned presiding Judge has said, "We are concerned with Mr. Barton's accuracy as a witness." My protest really arose out of your referring to part only of his Honour's assessment of Mr. Barton's evidence. It was a plea on my part for more accuracy on your part.

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MR. GRUZMAN: No your Honour with respect. I was addressing myself to something different. I was talking about Mr. Barton's honesty.

MASON, J.A.: You were talking on the issue of credibility, as to whether or not credibility of witnesses was a relevant or decisive factor on the issue under debate. You then said in coming to the witnesses, and his Honour's approach to them, that Mr. Barton was an honest witness.

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MR. GRUZMAN: Yes.

MASON, J.A.: I then interposed and drew attention to the other remark that his Honour made about Mr. Barton's evidence with the purpose of bringing to your mind the full picture as it appears in the judgment. It is merely a protest on my part against what I regard as a measure of inaccuracy in not giving the whole picture of his Honour's assessment about Mr. Barton's evidence.

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MR. GRUZMAN: With great respect, your Honour (I believe it is my fault) misunderstood what I was putting. I was referring to a passage where his Honour said it is in the light of the credit. What I said was on the one hand he had Mr. Barton as an honest witness. That did not mean, and indeed in the very case his Honour's view was that he was not accurate. I was not dealing with that aspect. I was explaining as best I might what his Honour meant when he said "I have decided this point in the light of the views I have formed on credit". In other words he is saying "I know Barton is an honest man, albeit he makes mistakes. I have taken that into account". That is all I was putting. 10

The difficulty is - and it really is quite important in our submission - if his Honour had felt it necessary to make a finding on the credit of Wild and Follington, we submit it could only be one way. We submit that their credit was absolutely destroyed. We submit that when your Honours have considered the evidence your Honours will so find. 20

If you go back then and trace it back, that means that it will throw considerable light on Exhibit 29. Your Honours will then have performed a task which his Honour the trial Judge, for reasons which seemed good to him, did not perform. Your Honours will be better informed than the learned trial Judge on the credit of Wild and Follington. 30

So armed we will invite your Honours to reconsider Exhibit 29. That of course will throw a great deal of light on the whole conspiracy.

His Honour also, as I recollect it, never made any finding on whether there was a frame up of Vojinovic under which Vojinovic was wrongly put in gaol on false and perjured evidence in order to put him out of the way because he had given up to the police the details of this conspiracy. 40

JACOBS, J.A.: The Court is most decided of the opinion -

MR. GRUZMAN: If I might be permitted to interrupt.

JACOBS, J.A.: Let me finish.

MR. GRUZMAN: I was only going to refer your Honour to the law.

JACOBS, J.A.: The Court is most decidedly of the opinion that the limited time remaining would be better employed in other aspects of the case rather than this one. 50

MR. GRUZMAN: Before your Honour made a ruling of any kind perhaps it would be appropriate if I made submissions on the law.

JACOBS, J.A.: I was not ruling. I was merely informing you.

MR. GRUZMAN: May I ask with respect am I to take it there is a limited time?

JACOBS, J.A.: There will be in the way this appeal is proceeding. An end to it must be within sight, or an end to the appellant's arguments. There will be a limit of time, if it becomes necessary. It may or may not.

MR. GRUZMAN: Would your Honours indicate how much time? 10

JACOBS, J.A.: The Court will indicate but not at the moment. You won't be rushed. You will have at least four days' notice of the end of your address. You could not complain of that, could you?

MR. GRUZMAN: Yes your Honour.

JACOBS, J.A.: You could?

MR. GRUZMAN: Yes.

JACOBS, J.A.: Four days' notice? 20

MR. GRUZMAN: Yes your Honour.

TAYLOR, A-J.A.: Are you seriously going to ask us to make a finding on the issue of whether or not Vojinovic was spirited away? What do you say?

MR. GRUZMAN: Framed.

TAYLOR, A-J.A.: And wrongly charged and convicted in Melbourne.

MR. GRUZMAN: Yes. The reason, if I may put it to your Honour, is this, we allege a conspiracy. We allege one of the conspirators told the police about it. That being so one would have expected, if the plaintiff's case was true, that something terrible would have happened to Vojinovic, and something terrible did happen and there is no finding of his Honour about it at all. 30

TAYLOR, A-J.A.: I am speaking only for myself. I came here with the firm conviction that there was a major point in this appeal to be argued, and it was this, if you accept the finding of the trial Judge as to the terror that was inflicted on Barton how can that stand as a finding. It is a major point. 40

MR. GRUZMAN: Yes.

TAYLOR, A-J.A.: Why don't you get on and argue it instead of talking about Vojinovic being convicted.

MR. GRUZMAN: In other words forget the facts. We cannot.

TAYLOR, A-J.A.: As far as I am concerned I do not propose to say any more. I will endeavour to hear the rest.

MR. GRUZMAN: I feel I should invite your Honours' attention to one or two authorities. We will try to provide your Honours with photostats at a later stage. There is a judgment in a matter of Rickman v. Thierry, Vol.14 of the Reports of Patent Design & Trademark cases. It is a decision of the House of Lords. At page 116 Lord Halsbury said at line 34 "I must add that I am entirely unable to yield to the argument which has been not unnaturally pressed upon us by counsel ... the judgment to be pronounced by the Court of Appeal is a judgment that ought to have been pronounced by the Judge of first instance". 10

I have already referred your Honours to the decision in London Bank of Australia v. Kendall, 28 C.L.R. page 407, a joint judgment of Isaacs and Rich JJ. "Where the law says that the court and not a jury is to determine the facts, and also says that an appellate court can be asked to reconsider them and therefore should reconsider them, it is the duty of the appellate tribunal, and it is the statutory right of the litigant who invokes it to require of it the performance of that duty ... a view that has been time after time enunciated and acted upon by the House of Lords and the Privy Council." 20

JACOBS, J.A.: I do not quite see how those cases refer to the approach the court should make when one matter before the Judge was the credibility of witnesses. I do not see that these passages deal with that problem. 30

MR. GRUZMAN: They do because this Court is to make a decision on the facts.

JACOBS, J.A.: On the credibility of witnesses?

MR. GRUZMAN: Anything.

JACOBS, J.A.: How do you reconcile that with what was said by Lord Sumner in S.S. Hontestroom v. S.S. Sagaporack, which was quoted at length and with approval by Sir Owen Dixon and Kitto J. in Paterson v. Paterson, page 222 Vol. 89 C.L.R. It seems to me that passage is on the point that we are faced with. "If his estimate of the man forms any substantial part of his reasons for his judgment, the trial Judge's conclusion of fact as I understand the decisions should be left alone." 40

MR. GRUZMAN: I will come to that case.

MASON, J.A.: Can you come to it now? 50

MR. GRUZMAN: No your Honour, I would prefer to defer the argument if I may.

JACOBS, J.A.: It would be wrong to distinguish between cases where the conclusion depends on inferences of probability and cases where it depends on credit. The usual situation is that there is a mixture of both. As I understand these passages one is not looking for an exclusive reliance on credibility but rather one is looking for what may be only a partial reliance on credibility before saying that the decision of the Judge below, if it so relies, should be left alone. 10

MR. GRUZMAN: With respect, what we would submit the effect of the decision is, is this, if the trial Judge - after all he has the witnesses in front of him and there are various matters which go to make up the Judge's view. One is what he says. Another is the way he says it. What he says you can check against documents or what other people say. On that point this court is in as good a position as anyone else. It can look at the materials and come to a conclusion. On how he said it - that is a matter which it is extremely hard to ask an appellate court to differ because the appellate court did not see him. There is a distinction between that one might call the demeanour of the witness, which it is almost impossible to ask an appellate Court to deal with. and the accuracy of the witness' evidence or his general credit, which is quite open. There is a passage in the judgment I have just mentioned. 20

JACOBS, J.A.: I was going to say something. My point is those are inter-related. My second point is demeanour is too limited a word. The demeanour for instance of Mr. Barton was of a man whose evidence was suspect. I do not wish to go into the facts of this case. I am using it for illustration. But nevertheless who was not perjuring himself. That was a conclusion eminently for the trial Judge to reach. If he reached the conclusion that Mr. Barton had great accuracy of recollection and meticulous recall, the finding on this point could have been different. 40

MR. GRUZMAN: Quite so.

JACOBS, J.A.: That shows to me that it was partly at least the Judge's view on the accuracy of evidence which led him to this conclusion. He could not give weight to Mr. Barton's statements in this particular because of his lack of accuracy in other matters.

MR. GRUZMAN: With great respect one could not argue against much of what has fallen from your Honour. So far as my submission is concerned I have the backing of the High Court. That is the difference between demeanour on the one hand and examination of his credit on the basis of materials on the other hand. 50

JACOBS, J.A.: If I transpose the language of Lord Sumner in the passage to which I have referred

at page 222 in 89 C.L.R., if Mr. Justice Street's estimate of Mr. Barton (this is at the bottom of the lefthand page) forms a substantial part of his reason in his judgment for the conclusion that Mr. Barton's statement on that day about seeing that document cannot be accepted, the trial Judge's conclusion of fact on that point should, as I understand the decision, be left alone. I think that sums up the matter that I wanted to put to you. I do not, for myself, doubt that our duty is to re-hear the matter in the sense that those words have been given. That is our statutory duty. The passage to which you have referred so far deals in my view with that point as distinct from the much smaller point of how you re-hear in a situation of this kind. 10

MR. GRUZMAN: I notice on the preceding page that there is another judgment cited by their Honours beginning about the sixth or seventh line, in which they say what appears to be the exact opposite. Page 220, at the top "Their Lordships emphasised that an appeal on questions of fact existed ... the Court of Appeal must re-hear and re-consider the materials ... be guided by his impression when the question of which witness is to be believed turns on demeanour ... be warranted in differing even on credibility when other circumstances show whether the evidence is credible or not". The trial Judge has the special advantage of demeanour. He has no special advantage of credibility, that is of comparing evidence given by one witness and another. On that this Court has as much right and duty to form an opinion as his Honour has. 20 30

JACOBS, J.A.: I appreciate that. I used demeanour to mean demeanour throughout the whole case.

MR. GRUZMAN: On demeanour, Barton wins.

JACOBS, J.A.: His demeanour was that of an honest but inaccurate witness. 40

MR. GRUZMAN: The inaccuracy in his Honour's mind does not come at all from his demeanour. His Honour says "I am satisfied he is an honest man. I am satisfied he was trying to tell the truth. I am also satisfied because there was this that and other evidence in certain respects what he said is not the truth.

JACOBS, J.A.: That is one way of putting it, but I do not accept that.

MR. GRUZMAN: That is in our submission all His Honour could say. 50

JACOBS, J.A.: He said he saw from his demeanour that there were substantial inaccuracies in his firmly expressed account of the negotiation. "They are firmly expressed, but I do not accept them".

MR. GRUZMAN: His Honour never said "I observed from his demeanour that there were inaccuracies".

JACOBS, J.A.: I think you are giving much too limited a meaning to the word demeanour.

MR. GRUZMAN: The House of Lords years ago was striking the difference between demeanour, meaning how a man looks -

JACOBS, J.A.: And inferences from surrounding circumstances.

MR. GRUZMAN: Yes.

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JACOBS, J.A.: I accept that.

MR. GRUZMAN: The only advantage the trial Judge has is on demeanour. The rest of it appears in the evidence.

JACOBS, J.A.: Demeanour is used not merely in the way he looks but in the number of times he has been caught out in inaccuracies and the circumstances.

MR. GRUZMAN: With respect not, according to the judgment. According to the judgment they are the matters that anyone would understand by demeanour: how he looks, the manner in which he gave his answers. The other evidence is already there, and it is there for your Honours to look at the same as it was there for his Honour Street J.

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If I may take up the judgment your Honour referred to. His Honour Taylor J. referred your Honour to this passage at the foot of page 222. That was only an excerpt from another judgment. The actual judgment of the Court then proceeds. I am referring to the bottom of page 222. These cautions - his Honour referred to a caution in an excerpt from a judgment. The Court goes on: "These cautions did not prevent this Court reversing Mr. Justice Mann on a pure question of fact depending on testimony ... they did so on the ground that his finding was not based on credibility". Mr. Justice Isaacs referred to a constitutional statutory duty upon this appellate Court to form its own independent opinion as to the proper construction of documents and the proper inference from evidentiary facts.

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One of the cases cited in that judgment is not the decision of the House of Lords in Watt v. Thomas. We have not sufficient copies photostatted yet for your Honours.

I refer your Honours to one or two more decisions on this point. The case of Watt v. Thomas is cited by their Honours in the High Court in the case to which his Honour Taylor J. referred. In 1947 in the House of Lords, 1947 A.C. 484 at page 486, Viscount Symonds said "If there is no

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evidence to support a particular conclusion and this is really a question of law the appellate Court will not hesitate to decide ... the view of the trial Judge as to where credibility lies is entitled to great weight ... this is not to say that the Judge of first instance can be treated as infallible in determining which side is telling the truth ... observing the manner in which their evidence is given". At the bottom of the page: "It not infrequently happens that a preference for A's over the contrasted evidence of B is due to inferences from other conclusions reached in the Judge's mind rather than from an unfavourable view of B's veracity as such". That is the type of problem which we submit is before your Honours. "In such cases it is legitimate for an appellate tribunal to examine the grounds of these other conclusions and the inferences drawn from them if the materials admit of this ... it will be justified in taking a different view of the value of B's evidence." This was in a divorce case where their Lordships point out those intimate matters in divorce are even more peculiarly a matter for the trial Judge. That was the House of Lords in 1947.

If I may refer your Honours to the decision in London Bank of Australia v. Kendall in the High Court of Australia. Isaacs and Rich JJ. said: "So far as the conclusions depend on materials such as demeanour which the learned primary Judge alone could have access to, we cannot say he was wrong. So far as the materials he possessed are equally before us, we are bound to form and express our own opinion. There is no special local experience for example which the learned trial Judge possessed and we do not".

At all stages on the one hand the distinction between how a man gives his evidence, that is his honesty, and on the other hand the evidence which he gives, or his credibility in that other sense is a matter for this Court as much as it is for the trial Judge.

The matter was considered by the Full Court of this State in a decision in Jones v. Jones which is reported in 79 W.N. at page 111. I am afraid it is not on the list of cases we have already given to your Honours. It is a joint judgment: "The learned Judge in divorce after a lengthy hearing on the 29th February 1960 found the first issue in the affirmative and the second issue in the negative ... (long quotation) ... on carefully checking the whole evidence by a critical examination the primary Judge's impression on the subject of demeanour was found to be mistaken ... decision was manifestly wrong". The Court then proceeded to go into a minute examination of the evidence. That is the Full Court of this State in 1960.

I am reminded that one of the reasons we make this submission and invite your Honours to consider

the evidence is that his Honour the trial Judge, for reasons that appeared good to him, deliberately did not take advantage of the material before him, when he said "I do not regard it as necessary or even desirable that I depart from a consideration of the matters decisive of success or failure in this suit in order to deal with the various charges against Sergeant Wild and Constable Follington. What his Honour did was to put out of question a mass of evidence which bore on the credit of witnesses and was material to the case. Now your Honours, with respect, would propose to do the same thing. 10

In our submission that is not justifiable.

Now might I refer your Honours to a decision of the High Court on this subject matter in last year, De Costa v. Cockburn Salvage & Trading Pty. Ltd., 44 A.L.J.R. 455. This was a decision delivered in November 1970. Doubtless this is a judgment your Honours may have looked at but the first point I wish to make is that their Honours in the High Court went meticulously into the evidence and each of their Honours came to a conclusion, after a consideration of the evidence, as to the views they would come to and each of them expressed - after consideration of the whole of the evidence - their views on the facts. Really, that is all that these submissions are directed to, that it is the duty and obligation of this Court to consider the whole of the evidence. 20 30

In the course of his judgment the learned Chief Justice said (page 1970), after having considered the evidence, "The matter that came before the Full Court was whether or not the primary Judge was wrong so to conclude ... I might say in my own personal view the primary Judge was right in concluding as he did". In other words, even in the High Court, their Honours sought fit to examine the evidence, come to a conclusion and take those conclusions into account in arriving at their decision. Windeyer J. says: "An appeal has been described by the Privy Council as a formal proceeding by which an unsuccessful party ... whether or not the Full Court should have disturbed it." His Honour then goes on to consider the facts of the case and eventually comes to the conclusion, I think it is true to say that each of the members of that Bench came to a conclusion on the fact. I think the Chief Justice would have found for the plaintiff, one of their Honours would have found for the defendant and at page 461 Windeyer J. - - 40 50

JACOBS, J.A.: There were five judges, three found that the appeal should be allowed and two of those agreed with the judge at first instance.

MR. GRUZMAN: Yes, although Windeyer J. at the end of page 461 says: "Had it been my task to try the case I would probably have seen the whole occurrence

as an unfortunate accident for which neither party was to blame". In other words, his Honour having considered the evidence on all aspects came to a conclusion.

JACOBS, J.A.: I think what you put is probably quite correct. Of the majority one judge said that the defendant was wholly to blame, one judge said that the defendant was not to blame at all and the third one said that the trial Judge was right in apportioning the blame. Yet, by the application of the principle in De Costa's case they all came to the conclusion that they should not interfere. 10

MR. GRUZMAN: Of the judges, Gibbs J. simply considered the facts. Walsh J. said that the decision in the Full Court of Appeal was a re-hearing (which it is not in the High Court), and Windeyer J., notwithstanding the view he came to, says at page 462: "The case, as I see it, raises the ever-recurring question of how far the Court of Appeal is justified ... general atmosphere of the trial". He refers to the judgment to which I have referred - that there is no presumption that the Court below was right - and deals with the meaning of the word "presumption" and also deals with "re-hearing". 20

I am not going to take your Honours through it in detail. We submit that there is a duty of this Court to examine the whole of the evidence and that this Court should so examine - due regard being had to any opinion formed by the trial Judge as to the credibility of witnesses and to the advantages that he derived in the general conduct of the trial. Those advantages are first of all limited to demeanour and it is from demeanour basically that the trial Judge makes his conclusion as to honesty and it is a fortiori on honesty the trial Judge is able to say: "Look, I know this man was mistaken in various things but I am not finding him to be a dishonest man". 30 40

JACOBS, J.A.: You identify demeanour with honesty?

MR. GRUZMAN: Partially.

JACOBS, J.A.: I think it is a fallacy.

MR. GRUZMAN: Would your Honour allow me to finish? Our submission is that it is an a fortiori finding an honesty where the learned trial Judge says "I am not finding that this man is an honest witness because it so happens that every word he says is correct. I find that he is an honest witness despite the fact that he makes mistakes". That is probably the highest finding the trial Judge could make of anyone. He says "I know he has made mistakes and forgotten that and forgotten this but I am satisfied that he is an honest man". 50

The strength of our case and our submissions is that not only was he an honest man but also that he was accurate and that his Honour's failure to find in his favour certain facts was wrong and that in one or two cases where his Honour uses the fact that he has given some evidence which was correct, I think I am correct in saying, particularly as to his denial of the Smith conversation prior to 4th January. That is not only understandable but when properly understood it gives even further support to his honesty and his general credibility. 10

JACOBS, J.A.: Could I say this, the one witness that was accepted by the trial Judge as honest was Detective Sergeant Lendrum in a number of matters. He was at conferences with Mr. Barton.

MR. GRUZMAN: One essential matter?

JACOBS, J.A.: Yes, let us take it as one essential matter. Someone was inaccurate in that situation and if a person is inaccurate in one he may be inaccurate in others, so that casts doubt on his accuracy. Does not that mean that the accuracy of Mr. Barton was a factor in the Judge reaching the present conclusion based on the assessment that he made of Mr. Barton vis-a-vis Inspector Lendrum; just taking that as a limited area? 20

MR. GRUZMAN: Firstly, we challenge his Honour's finding on that.

JACOBS, J.A.: On Detective Sergeant Lendrum too? 30

MR. GRUZMAN: Yes.

JACOBS, J.A.: And that did not depend on demeanour as well?

MR. GRUZMAN: That is a finding. This Court is not prohibited from dealing with a finding because it is based on credibility in the true sense.

JACOBS, J.A.: You have been over that. I note the stress you place on the word "prohibited".

MR. GRUZMAN: Yes, I do, and I appreciate what the force of the submission is. 40

JACOBS, J.A.: But even in the absence of prohibition, the word you place so much reliance on, the traversing of such a situation - in the light of the authorities to which you have referred - can be utterly time-wasting, and that is what the Court was referring to earlier.

MR. GRUZMAN: No, your Honour. Your Honour has mistakenly taken my word. Your Honour referred to one specific incident with Inspector Lendrum and I agree with your Honour that on that point the question of credibility in the true sense, or the 50

wide sense, including demeanour was involved and that is a matter which we are going to canvass, but it is a matter which will be disposed of in probably 10 or 15 minutes.

JACOBS, J.A.: Your answer was twofold, as I understood it, (A) You were going to challenge that evidence too and (B) in the same way demeanour was important in that matter it does not carry over into demeanour as a test of accuracy in every context?

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MR. GRUZMAN: No, that is not what I am putting, if I may say so. There are two questions. A man might forget something, indeed his memory might be such that when he goes into an exam room and is asked "What is the formula for so-and-so?" he puts down the wrong answer - his memory fails him completely. His evidence might be false, and truly false, and even unacceptable, but he is an honest man doing his best. Now a Court case is very much like an examination room where you are trying to remember what you can and do your best with the events going over the years. A witness should not be said to be not believed because he makes mistakes. There are two factors (1) he is doing his best or making up a story, or (2) assuming that he is doing the best, is it true?

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On the first one Barton got full marks. On the second one he got little less than full marks. Indeed his Honour found that Mr. Armstrong was telephoning in the early hours of the morning - matters such as that - all based entirely on the very high opinion which his Honour formed of Mr. Barton's truthfulness. But it is not a case - and I would like to put this submission with all the power that I can, when your Honours indicated this morning a certain view - and, I hope, very respectfully - because a view was expressed before we had any opportunity of putting any submissions to your Honours relating to that view. We do not wish to take up the time of this Court unnecessarily but we certainly do wish to present the appellant's case properly. Until your Honours have heard our submissions on the relevance and importance of these matters your Honours were - I say so with great respect - really in no position to form a view. His Honour the trial Judge has said in his judgment: "I do not think it is necessary to consider these matters", and one of the very grounds of the appeal was that his Honour was wrong in so doing. Our submission is that these are matters - these are indeed some of the very matters - which led his Honour to come to the wrong conclusion. These are some of the very matters which we came here to argue, they are not side-wings.

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JACOBS, J.A.: I just want to repeat, Mr. Gruzman, that it is not usual for this Court to reach any view on any matter that is fairly open to it without giving counsel every opportunity. I think counsel has been given very considerable opportunity,

considering the course that has been taken already. The Court indicated a view based upon a traditional attitude towards findings on credibility by a Judge at first instance, an attitude which - speaking for myself - I find reinforced by all the authorities to which you have referred. And the Court indicated that in the light of such authorities and in the light of such precedent that to go at great length through the evidence of the police officers in this case on this issue of fact would be time-wasting. I must say that I see no reason now to depart from that view in the light of the cases to which you have referred us. That was an information from the Court, but the Court cannot stop you in the time you have got at your disposal from presenting such arguments as you think. 10

MR. GRUZMAN: Your Honours, my learned friend Mr. Horton suggests that I might refer your Honours - and I do - to page 3103 of his Honour's judgment which sets out the approach which Mr. Justice Street put to this case. He said "Mr. Barton is the plaintiff in the suit and he bears the burden ... in favour of an affirmative finding". At page 3181 his Honour makes such a finding in respect of this matter: "On evaluating the whole body of the evidence ... that such a statement existed". 20

MASON, J.A.: You have to add to that what appears at page 3115 where his Honour is dealing with Mr. Barton's credibility as a witness and certain factors which induced his Honour to take the view that great care must be taken in accepting and acting upon Mr. Barton's uncorroborated evidence - "I have great doubts ... mainly Detective Inspector Lendrum." 30

MR. GRUZMAN: That is what his Honour meant when he said "It is in the light of my views" of Mr. Barton's evidence, that though honest he is not necessarily reliable. If we satisfy your Honours that that view was wrong, we are entitled to have your Honours come to a different view. 40

MASON, J.A.: If you can.

MR. GRUZMAN: If we can, but your Honours are saying we cannot.

MASON, J.A.: Nobody has said you cannot.

MR. GRUZMAN: We have been told in no uncertain terms.

MASON, J.A.: You should pay attention to the language used; nobody has said that you cannot.

MR. GRUZMAN: I propose to take advantage of that too and I propose to proceed. It is unfortunate for counsel to have to proceed without feeling that the Court will be accepting you, and the only thing I propose to do - and I propose to proceed - is to submit this: firstly, we have sought to prove 50

a conspiracy and this is a point which has been lost sight of. We seek to prove a conspiracy, we seek to prove a conspiracy to murder. It may have been something else but basically what we are putting is a conspiracy to murder.

Now, to establish that conspiracy we are entitled on the authorities, going back many years, to prove a number of facts to the Court; and amongst other things we rely upon circumstantial evidence. We seek to show that Armstrong said: "I can get the police to destroy evidence". We seek to show that he has used that power to destroy evidence of the conspiracy. We seek to show that Vojinovic, who was the person who revealed the conspiracy to the police, was falsely charged with a crime and was wrongfully put in gaol in order to put him away after he had divulged this information to the police. 10

Those are matters which in our submission are important and serious matters and proper to be considered by the Court. 20

The proof of them involves mainly one matter, which is this when Vojinovic was on this false charge the sergeant in charge of the matter in Melbourne wrote to Detective Sergeant Wild and said to him: "In effect this man tells me that he is being the subject of a false charge because he gave information to the police, to the effect that an M.L.C. was threatening the life of some other man. Is that true?" It turns out that Wild first of all has destroyed the letters but, secondly, admits that he never gave that sergeant the information that he wanted. Sergeant Mengler had said that he wanted information about what he regarded as a cock-and-bull story, and wanted confirmation of it. Vojinovic had referred him to Wild but Wild never replied and as a result of that Vojinovic was sent to gaol for six months. 30

TAYLOR, A-J.A.: Was he found guilty?

MR. GRUZMAN: Yes. 40

TAYLOR, A-J.A.: After a plea of not guilty?

MR. GRUZMAN: Yes.

TAYLOR, A-J.A.: And you say that was a wrong decision?

MR. GRUZMAN: Yes. Novak, the other conspirator, was the man who gave evidence - the only evidence - against him. The only evidence against him was that of his co-conspirator, Novak, on whom he had informed the police anyway. That was the evidence before him and he swore Mr. Justice Street that that was false evidence. This took place a couple of days after he had been to the police about the matter. There was cogent evidence before his Honour that Vojinovic was framed and, I put, I had put to 50

Wild that he knew it had happened when the policeman in charge of the case in Melbourne had made these inquiries. The policeman in charge of the case in Melbourne was the sort of man who would have seen that justice was done if only Wild had confirmed Vojinovic's statement. That is, that he complained to the police, but Wild did not do it. There was evidence of the strongest kind that Vojinovic was framed and that reflected on Wild's credit. Why did Wild do that? Mr. Justice Street made no finding on that at all one way or the other and never referred to it. We in due course are going to seek to examine the evidence in detail and ask your Honours to make a finding on that matter and then we are going to look again at Wild's credit and Follington's credit in detail. His Honour makes no specific finding on their credit, neither for them nor against them. As your Honours see in the House of Lords judgment to which I have referred your Honours, a judge sometimes makes a finding - preferring the evidence of one witness to the other without even in his own mind making a decision as to credit. The House of Lords recognised that, and this appears to be one of those cases. 10

Now we are inviting your Honours, and we propose - unless your Honours direct us that we shall not - first of all to refer to the framing of Vojinovic, amongst other things, and ask your Honours to make a different finding on it, and then go into detail of the evidence of the police and ask your Honours to make a finding on that and from that to come back to Exhibit 29 and reconsider that matter in the light of those findings. I propose, unless I am directed by your Honours to the contrary, to proceed along those lines. 20 30

JACOBS, J.A.: How long do you think that will take you, Mr. Gruzman?

MR. GRUZMAN: How long will it take?

JACOBS, J.A.: Yes. 40

MR. GRUZMAN: It is very hard to say, your Honour, and I cannot confine myself to an estimate but the best estimate we can give your Honours is this - I am part of the way through the main conspiracy now and I had indicated that the police were concerned in another matter, so we have just dealt with that question this morning. We would anticipate that the balance of the conspiracy and the dealing with police evidence would be completed, we think by Thursday afternoon. 50

JACOBS, J.A.: Two and a half more days?

MR. GRUZMAN: I do not know, your Honour. It is really very difficult to say.

JACOBS, J.A.: That is what I mean by "in the light of being so time-wasting".

MR. GRUZMAN: If it is time, justice requires - -

JACOBS, J.A.: You do not need to remind this Court of it, Mr. Gruzman?

MR. GRUZMAN: It is our very respectful submission that to place a time limit or to really regard a decision on this matter as affected by time in our submission is not right, is not justified.

Do your Honours wish me to proceed now?

JACOBS, J.A.: You proceed with your argument, Mr. Gruzman.

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MR. GRUZMAN: Your Honour, Mr. Justice Mason, asked for some information yesterday afternoon about the 222 notice. We gave some information then, but might we now give a further reference to page 2431 in Vol. 7, Exhibit 3. That is the letter that Barton left when he went overseas. At line 19, dealing with the number of mortgages, it set out the details - "He verbally postponed his mortgages", to that date, etc. That may throw some light on your Honour's consideration.

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MASON, J.A.: Thank you.

MR. GRUZMAN: Now, your Honour Mr. Justice Jacobs asked for a note of reference to the U.D.C. between 14th December and 18th January. We have done that in the form of just references, but we were wondering if your Honour would prefer it with the catchwords to identify the references?

JACOBS, J.A.: No, that will be sufficient.

MR. GRUZMAN: We will hand up three copies (Produced to Court).

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I was dealing with the general trend of the conspiracy and the pressure and we had come to 7th January. I had told your Honours something of Vojinovic's conversation with Barton at the Rex Hotel and I think I had said that the police at that stage treated this as a very serious matter. Mr. Barton attended at the C.I.B. on Sunday morning with a Q.C. and a solicitor and saw a senior member of the police. He saw a senior detective, who with a constable was assigned to the investigation. The constable went to Barton's home and stayed there and in due course overheard a telephone conversation when the man Vojinovic rang.

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Mr. Barton, we would submit, at this point of time of course had a concrete threat and one which, one would assume, was such that he felt that surrounding himself, as he did, with a body of legal people and going to the top man available in the C.I.B., that he could at least at this point of time expect proper police protection. It is very significant, indeed, that this is what he got - up to a certain point. Follington was at his home, the man

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Vojinovic telephoned and - going on police instructions - the trap was laid.

Barton, of course, as a man of non-violence must have been gravely affected by having to be in his car outside the St. Vincent's Hospital. He was instructed not to let the man get in the car because of the dangers involved in that. Follington, as he said, took off his coat and left his hardware (I will come back to that later when considering the credit of the police) in another car and then in due course to took Vojinovic and Vojinovic was taken to the police station. 10

At the C.I.B. he made a statement, which is in evidence. At page 563 Mr. Barton said in relation to going to the police (read), which is fairly indicative of Mr. Barton's state of mind and the dangers he saw in going to police other than at the top.

If one could summarise the Vojinovic effect on the police, and the effect of what Vojinovic said: Mr. Barton said that Inspector Lendrum went into the room where Vojinovic was being interrogated, found out what had happened and came out and said that Vojinovic had confirmed Barton's allegations. 20

I do invite your Honours to have a look at Vojinovic's statement, which is the central document in the case: page 3170, or page 318 of chronology. This document is of vital importance. The existence of this document is of vital importance. The fact that Barton had this document is of vital importance. I will have more to say about that on the police credit but at this stage I only make this submission that had it not been that Barton fortuitously got a copy of this document one would have every reason to suppose that the existence of that document would have been in doubt. A matter to be remembered, and I will come to it later, is that Constable Follington (according to Wild) acted wrongfully and illegally. According to Barton, he got it from Follington; according to Wild that was wrongful and illegal. But the fact is that Barton got a copy of this statement. What I said before was that Wild said he got it wrongfully and illegally and Barton said he got it from Follington, but the significant fact is that it was a matter of great importance for the prosecution of this case, and Barton's ability to present the case, that he actually got a copy of this document. 30 40 50

This was the interview between Wild and Vojinovic on 8th January in the presence of Constable Follington (page 2559). He goes through his address, gives his date of birth and so on - (read).

(Luncheon adjournment).

JACOBS, J.A.: This appeal will by the end of this afternoon have proceeded for seven full hearing days and, contrary to the implications in some of the remarks addressed to the Court this morning by senior counsel for the appellant, the Court is determined that this appeal receive a very full and adequate hearing.

Usually counsel can be relied upon to strike a balance between the requirements of justice and an exhaustive, ruinous prolongation of the time of hearing. The presentation of an appeal is a matter of co-operation between the Court and counsel but after seven days we have been forced to the conclusion that the co-operation is lacking in this case. 10

We wish to make it clear that we are willing to receive the submissions of counsel on all points arising in the appeal. At the same time we want to be sure that in the presentation of those submissions the appeal is not unduly and unreasonably protracted. We have therefore come to the conclusion that we should allow ample time for counsel to present arguments but we should not allow unlimited time. It must be borne in mind that all counsel's submissions to Mr. Justice Street were completed within some 14 days and the issues of fact to be unravelled were then certainly no more complex. Indeed they are less complex before us because we have the advantage of the judgment of Street J., with its analysis and conclusions. 20 30

We have therefore determined that justice will be best served in this case by placing a time limit upon counsels' addresses, reserving to counsel, however, a completely unlimited right to present further submissions in writing with as much repetition in whose written submissions of passages from the evidence or exhibits as they may think fit.

To that end we have determined that counsel for the appellants, although they have had now seven full days in which to make submissions, should have a further seven days. Then counsel for the respondents may have eight days although, since the appellants will on this timetable have had almost twice the time allowed to the respondents, this time will be subject to review. Then the appellants will have three days in which to reply. 40

We think that this is a most generous allowance of time.

MR. GRUZMAN: Your Honours, your Honours have, with respect, criticised all counsel involved for unnecessarily prolonging this matter. In our submission no such criticism is warranted and the only matter which did arise was when your Honour Mr. Justice Taylor this morning indicated whole areas of the matter which we regarded as important should not be dealt with by the Court at all. This, 50

the subject matter of your Honours' criticism of the matters which arose this morning, all related to one thing only and that is whether we should be permitted to argue questions relating to Exhibit 29 and the related matters of the training of Vojinovic and police credit. As far as we may, with respect, we reject the criticism that we have unnecessarily in any way unduly prolonged the case.

Your Honours having indicated what we should do, of course we shall adhere.

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I was in the midst of reading to your Honours Vojinovic's statement as given to the police and I think I had reached the point about the diamond ring. Your Honours will recognise our submission that the fact that this man Vojinovic knew about the diamond ring was a matter of considerable significance. The question was: "Did you tell Mr. Barton actually how you came to know about this? A. Not really. I just told him that I got to know about it from another fellow ... catch these fellows". This is entirely inconsistent with the thought that Vojinovic was acting on his own. What he said was that he had a plan to catch the other people involved, by which they could be caught. This is what he told the police at C.I.B. headquarters, not in exculpation, but something he plans to do. "Did you have any other conversation with Mr. Barton at the Rex Hotel? - - Detective Mackie A. No." I ask your Honours to note how these matters were possible to be confirmed and they were confirmed. "Did you take Detective Mackie ... he could start working on it straight away". Again noting that what is being said is that he will be able to have the other people caught. "Then I rang Darlington again ... he is no good to anybody".

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It is rather interesting and significant that first of all Vojinovic appears to be honest in that he is stating truthfully that he had a great dislike of Frederick Hume, and, as all the evidence shows, one can see here that he is referring to the fact that Hume told the police about his countrymen, and he is here commencing a statement without any prompting, revealing his feelings about Hume. Vojinovic might be a criminal and all sorts of things, but he appears to be telling the truth. Then, as we submit, a rather prophetic remark, he was asked: "Why don't you tell the truth?" and he said: "I thought it was ... easily". That is exactly what happened. "When you first heard of this did you ... 1959". And the record of interview is signed by Sergeant Wild.

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Mr. Barton (1/34) says that his home was watched by people practically to 8th January. Up to that time and, indeed, afterwards but certainly up to that time he had been receiving telephone calls between 4 and 5 in the morning and in January 1967 he recognised Mr. Armstrong's voice, sometimes the caller said "You will be killed". On the

occasion he recognised Mr. Armstrong's voice he said that Mr. Armstrong said "You will get killed" - nothing else.

It was at 7 o'clock in the morning on 8th January that he rang Mr. Fred Miller of Allen Allen & Hemsley, the solicitors, and the conference had been arranged for 11 or 11.30 at the C.I.B. He says (1/56-59) that Mr. Miller said that he knew Mr. Armstrong very well, that he had been on the Board with Mr. Armstrong with Australian Factors. He said to Inspector Lendrum that he knew it was a serious matter because he had been threatened by Mr. Armstrong himself. "I told Mr. Lendrum what happened on the Saturday afternoon ... from the man who calls himself Alec". Inspector Lendrum refers to most of that, except for one thing - he denied that he referred to the policemen as dogs. He agreed with everything that was said after that expression, and the explanation of it. One might ask oneself why would Mr. Barton say such a thing if it was not true. I suppose that from Inspector Lendrum's point of view, to refer to the policemen under him as dogs may be significant. It certainly meant nothing to Barton, nothing whatsoever, for a detective inspector to refer to his men as dogs. But he denied that, and that is one of the matters that Inspector Lendrum has denied. If your Honours came to a different conclusion it would be a matter of some significance. There is no doubt that Inspector Lendrum regarded this as an important and serious matter because he sent Follington to the Barton's home. They came to his home about quarter to one and the man had rung again about 11 o'clock. Follington then gave him instructions. "Before he rang Follington instructed ... will be the best time to catch him". I ask your Honours to recollect - and I will refer your Honours to this evidence - that later on Wild and Follington and everybody was saying that this was not an important matter - we realised it was just a joke - nothing turned on it. "We were not concerned, we did not try to catch the man. We invited him down to the C.I.B., as it were, for a cup of tea". These are facts which are substantially not in dispute. At 11 "A man named Alec rang and I said to him ... Mackie". Then he gives some description of him being in touch with him along the lines I have read to your Honours. It was said to him: "Look, you do not have to, but if you like you can pay money to this man through the police so that he will assist". Now, there will be a lot of evidence on this, because pursuant to that \$400 was paid over. Barton swears that it was paid to Sergeant Wild, while Vojinovic swears that he received \$300, so that is very significant.

TAYLOR, A-J.A.: And Wild kept the other 100?

MR. GRUZMAN: Yes, exactly.

I will refer your Honours to the evidence, but Lendrum says that the police do this sort of

thing every day, pay money for information, but it has to be done with the permission of the Commissioner. This was on a Sunday and therefore he said if he had told Barton that he could pay this money in this way he (Lendrum) would be open to censure even though there is no question, nor was it ever suggested otherwise, that Inspector Lendrum was acting in good faith and in the interests of justice. Although we have something to say on the inspector's credit, it is on two points only: the "dogs" and his saying that while there was no necessity to pay the money through the police to Vojinovic. On the other hand there is no suggestion whatever as to his good faith and the pride of his conduct and his interest in justice.

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So then Barton says the next thing was that at 6.30 the following day: "At 6.30 ... I took out \$1,000" - which he had borrowed and given evidence about - "I told him it does not matter ... his gun and other equipment".

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I am going to take your Honours subsequently in some detail to show the untruthfulness of Follington in regard to the gun because apparently it was a breach of some police regulation for him to leave the gun in the way that was said. Then he swore that he put it in the glovebox and locked the glovebox. He swore that positively. Then we had the very car brought to court and he went down and had a look at the car and said that was the car, but then it was found to be impossible to lock the glovebox in this car because there is no lock and he said "Somebody must have changed the glovebox" He said "I am in danger, I have to be very careful ... entirely up to my decision if I wanted to do it or not".

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Just going ahead a little bit, as your Honours will find, Inspector Lendrum then departs from the scene. He had other duties; this was not his job at all. He just happened to be the senior officer on duty that day and from that moment onwards, as we will establish to your Honours, the whole of the police investigation is in the hands of Wild and Follington. Then it followed from that that Inspector Lendrum said not only was it in the hands of Wild and Follington but if Sergeant Wild happened to say "There is nothing in it", that was the end of the matter.

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Inspector Lendrum confirmed a substantial part of Barton's evidence in this respect (Chron. 342) where he was asked: "Did you say anything to Barton to the effect ... A. I could have said something along those lines to him ... I could not recall now". That is a rather important matter, that it is common ground between the police and Barton, that the reason why Vojinovic was let go was that he could involve other people or provide information. But you find Follington vigorously denying it and saying he was let go because there

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was nothing in it. Inspector Lendrum is saying that he was let go on the basis that he could help to bring in the other people.

I might say that this is evidence-in-chief to Mr. Bainton that I am dealing with at this moment. It is put to him by Mr. Bainton at page 327 that he had been promised protection by the C.I.B., who said that they would protect him whatever happened - "Have you any personal knowledge ... was necessary before this". I won't go into the details of this because it gets onto the police credit matter at this stage and I am really taking your Honours through the chronology on pressure. It is sufficient for the moment to say that Barton obviously went through a terrifying experience on 7th and 8th January in relation to this matter.

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I think I have remarked before that it is one thing to be a soldier in the field but it is another thing to be all on your own with your life threatened, not knowing from which corner the gun is going to come that is going to harm you. It is an all-pervading, continuous and terrifying affair and here it was brought home to him in the most complete and terrifying terms when the elected gunman actually spoke to him and proved to him by the man's statement to the police, which they heard.

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I will come at a later stage - I will just remind your Honours now of this - to the fact that although Follington and Wild were saying there was nothing in it, when Follington made his report to the police department finally on this matter he stated (Chron.368): "Mr. Barton and his family were obviously in fear of their lives". Lendrum was asked at 705: "Did you say to Mr. Barton this or anything to this effect that he, Mr. Barton, was in danger ... A. I did not say that". The passage I just read to your Honour rather indicated that he said something of that kind and he reassured him.

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So we reached the stage where Barton then leaves the C.I.B. and this man has been arrested and his worst fears have been confirmed - Armstrong was actually trying to kill him - on this man's say-so. That was one of the matters the police tried to play down, that the man was arrested. The police had said - sarcastically, I put - in effect that they asked him in for a cup of tea. But there was nothing like that. What Barton said was that a policeman stayed in his home all day, phone calls were being made and an arrangement was made to meet this man and Barton was warned by the police then that the man may be dangerous. He was warned to protect himself. The police directed the conversation over the telephone. Follington left his equipment in the car, came down the street in his shirtsleeves and grabbed the man. This is so significant that afterwards, when this investigation had been stopped - and stopped, as we put, by Armstrong - stopped by Armstrong, and I base that on

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the evidence that Follington told Barton that Wild was working for Armstrong, the investigation came to a stop and from that point on the police back-pedalled. They tried to play down the seriousness of this matter. They said there was nothing in it, nobody ever thought there was anything in it, "it was just a joke".

But how else could they justify their inaction? We do not really accuse them of inaction, that was not the accusation. The accusation was that they had actually destroyed some of the evidence they had guarded, and that they had done so because Armstrong had procured. That is why it is, and this is why I have taken the course despite the admonitions of your Honours (which I respect) of inviting your Honours' attention to the significance of these matters. It is important that you should read this evidence, the police evidence, and say to yourselves "This man was not arrested, he wanted to come", or that type of thought. But this is certainly what the police have tried to do in order to explain why it is that they did not take the steps which Inspector Lendrum (as I will show) said they should have taken. This is their defence when they are up before the Police Tribunal, because Inspector Lendrum said - and I will show this to your Honours - that he was not condoning or condemning because at some stage he might be the person who would sit in judgment on these same policemen and he was therefore in a very difficult position in giving his evidence.

It is enough for me to say "Yes, this man was arrested and this is the man who said that he was a party to conspiracy to murder". Even if a different view had legitimately been taken at that point of time when Mr. Muir Q.C. - who was personally known to Inspector Lendrum, as the evidence shows - was present, and the presence of Mr. Muir gave some weight to the complaint in the eyes of Inspector Lendrum. At that point of time all they knew was that a cogent complaint was made. A man was talking about murder and being paid to kill and they had to get the man. Why would they assume from that that this man would come at a mere invitation? Would not you expect that everything would happen as Barton had said, namely that the police would carry out their duty and take such steps as necessary to guard against the very possibility that the man would try to escape?

So at this point of time Barton must have been in the most real fear. On the next day Follington's notebook on the point said: "Vojinovic was then sent to the C.I.B. where he was questioned at length by Detective Sergeant Wild and a record of interview taken".

At 372 Barton says: "The next morning at 9.30 I went to the C.I.B. and saw Detective Sergeant Wild and Detective Follington ... what he made".

Then that document was tendered, and your Honours are familiar with it. Then he was asked: "What did you do? A. First of all I rang Medlow Bath to try and find accommodation for my mother, my mother-in-law, my father-in-law ... possibly on the 9th". That was on the Monday. "What else did you do ...". He said he arrived at the C.I.B. at 9.30 on the Monday and went straight to Mr. Wild's office.

At page 375 Vojinovic said "... in the afternoon you phoned Mr. Wild, didn't you? A. That is right ...". At page 355 of the appeal book he was asked, on being recalled, "Did you receive any money in Victoria Street ... Detective Sergeant Wild gave it to me". Why would this criminal admit against himself that he received \$300 from Detective Sergeant Wild? Why would he say that and possibly put himself on a criminal charge? 10

TAYLOR, A-J.A.: We should believe him in preference to Wild? 20

MR. GRUZMAN: Most certainly.

TAYLOR, A-J.A.: Was not he a "panderer", with convictions for living on women?

MR. GRUZMAN: He had convictions for lots of things. Possibly. But I put his credit above that of Detective Sergeant Wild, and he was a man convicted of practically every offence you can name.

JACOBS, J.A.: You do that on the probabilities, as I understand it. 30

MR. GRUZMAN: Yes.

TAYLOR, A-J.A.: And you do it seriously?

MR. GRUZMAN: We respectfully ask your Honours to accept it.

TAYLOR, A-J.A.: That is your submission? You ask us to prefer the evidence of this man who was in gaol at the time he gave evidence?

MR. GRUZMAN: Yes. It is a tragedy that one has to submit to a court that his credit is better than that of a detective sergeant of the police force, but you have only got to look at it. Why would he say it? What would be his object in saying "I procured as a result of what I said \$300". And of course, jumping ahead again, when you see Wild's evidence on it and how Wild tries to explain with one lie after another what he is saying to Vojinovic at that time and what he is doing with him, and why he spends all day on the Monday - as he says in his notebook - on the Barton v. Armstrong case and all he is doing is sitting there, waiting for a telephone call from Vojinovic, waiting by the telephone for Vojinovic to ring him, and 40 50

he goes up and sees Vojinovic and the only conversation is that Vojinovic says: "I am charged. What's going to happen?" and Wild says: "That is a matter for the police officer in charge of that case" - a bit of conversation along that line. It is absolutely incredible and it proves beyond any doubt that Vojinovic received this money from Wild, and the only reason why Wild denies it is the fact that he would have to account for receiving \$400 and show what he has done with the \$100. Barton has to be accepted on that. 10

That appears at page 394 of the chronology. He said when he received the \$300 there was nobody else present except Wild.

One might ask, of course, if he was going to make up a story, why was it \$300 and not \$400? The evidence is, I notice, that he is at present in gaol on a charge of break, enter and steal and his criminal record is in evidence, Exhibit "0". That appears at Vol. 7, page 2211 or in the chronology at page 465-466. Briefly his convictions start from 1961. (Reads Exhibit "0"). 20

One of the matters that we submit will perturb your Honours is that here is a record showing that on 16th January he did not answer his bail to a charge in New South Wales, and no steps were taken to bring him before the Court.

Perhaps I should refer your Honours to Wild's evidence on the 9th January about this matter. "Were you on duty the following morning, Monday the 9th? A. Yes ... to enable the other people to be called". I will show your Honours in the evidence the proper charges to be laid against Vojinovic were either conspiracy to commit murder or demanding money with menaces, which he agrees are two of the most serious charges in the book, but nothing is done. This is on his own say-so. There was concrete evidence of that. You have only to take Barton's evidence and add to it Vojinovic's admissions in his statement. Supposing Vojinovic's story was a complete falsehood, then he was trying to get money from Barton by false pretences; but nothing is done. The only consistent reason is that at that stage it was thought the better interests of justice would be served by allowing him to go to get the ringleaders, Armstrong and Hume. 30 40

This is what Wild had to get out of. Once he had gone over to working for Armstrong he had to explain why was Vojinovic let go. 50

Then he puts the other argument, or tries to very unsuccessfully. Let us look at what Wild says. "Were you on duty on the following morning, the Monday? A. Yes. Q. Did you on that day see any of the people you had seen the previous day? A. Yes I saw the man Vojinovic ... I drove straight to Greenknowe Avenue". He takes a police

car for the second time that day to see Vojinovic. "Did you then have another discussion ... that was the text of the conversation I had with him on that occasion".

One does not have to be particularly clever to see what Wild is doing there. First of all there is not a word about this in his notebook. This is after Wild has decided to back pedal so that he can say notwithstanding all the evidence he thought Vojinovic was trying to blackmail Barton. Then he cannot explain why he does not charge him. Barton is happy to give evidence. Vojinovic has made a statement which is confirmatory. Wild is in a lot of trouble at this time. 10

In the next passage Wild is asked about Hume's fingerprints. Here is a senior police officer with 28 years' experience. Hume is referred to and we all know the police have fingerprints. "Did you check to see if his fingerprints were on the file? A. Yes. Q. Were they? A. No ... they are not on the file; I checked that". We had Hume's fingerprints in Court. We had in Court a copy of the police records with Hume's fingerprints. Here was Detective Sergeant Wild, a senior detective of the C.I.B., saying he could not find any fingerprints. 20

JACOBS, J.A.: Where did you get those?

MR. GRUZMAN: We had them. How they came is another matter. We happened to have them. It is only matters like that that have saved this case. 30

JACOBS, J.A.: Mr. Justice Street did pay regard to that.

MR. GRUZMAN: This is not a matter that his Honour referred to at all.

JACOBS, J.A.: Generally the industry of the plaintiff's advisers. It was industry and care that got a lot of material out in this case.

MR. GRUZMAN: The substance of our submission is because by one means or another two documents had been obtained and were in the possession of counsel for the plaintiff, namely Vojinovic's statement which Wild said should never have gone out of possession of the police. 40

TAYLOR, A-J.A.: You mean his record of interview.

MR. GRUZMAN: Yes. Secondly we were able to prove that you could not believe a word Wild said because Wild swore he could not find his fingerprints and we actually had them. We had a copy of course. We did not take the originals. We went through the process then of subpoenaeing them from the police department. They say they cannot find them. Eventually they turned up. Lo and behold they had been there all the time. A most awful series of mistakes occurred. 50

May I turn to Wild's evidence: "Did you check to see if his fingerprints were on file? A. Yes. Q. Were they? A. No ... later I found he changed his name by deed poll." I showed him the document. "What is your explanation how you could have searched the records and not found anything about the name Hume ... I did not see him on the Monday or Tuesday".

TAYLOR, A-J.A.: At page 813 you put to Wild that he destroyed his record of interview with Hume. You did not put to him "at the request of Armstrong". You put it "at the request of Armstrong or Hume or of your own volition". He did not say no. He said there was no such document.

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MR. GRUZMAN: Yes.

TAYLOR, A-J.A.: It was never put to him that it was at Armstrong's suggestion. What was he to do with that question - take his pick?

MR. GRUZMAN: Yes.

TAYLOR, A-J.A.: Supposing he had said "No", what would it mean?

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MR. GRUZMAN: His answer was "there was no such document".

It was put to Wild on page 388 he had said subsequently that he had interviewed Hume on the 18th January: "I would be grateful if you would answer the questions. Whenever the interview took place, was it not important to you to record the questions and answers? A. No ... extremely serious investigation you were making? A. Yes". That is one example of Wild's reckless ability to tell lies.

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TAYLOR, A-J.A.: Supposing we were to embark on the task of resolving this, how would it bear on the question of whether or not these threats that were found influenced Barton to sign the document.

MR. GRUZMAN: They do not go to that question.

TAYLOR, A-J.A.: It does not go to it?

MR. GRUZMAN: No.

TAYLOR, A-J.A.: Why should we bother with it?

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MR. GRUZMAN: I am glad your Honour raised the question. This is our submission on that point. It is very simple. One of the things that the trial Judge did not find in our favour was that Armstrong was directly implicated in the conspiracy. He did not find Exhibit 29 in our favour. His Honour did it in the light of his views as to credit he said. His Honour thought it was not necessary to go into these matters.

I am going to submit first of all if you come to the conclusion that for example Wild was a party to or did not prevent, when he could have, the framing of Vojinovic; if you come to the conclusion that Wild and Follington are prepared to lie and did lie in this case, then you will come back and you will reconsider in our submission Exhibit 29.

TAYLOR, A-J.A.: You mean you will find that Exhibit 29 existed?

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MR. GRUZMAN: Yes, because you will be satisfied that Wild and Follington destroyed that document. You will be forced in our submission to that conclusion because the evidence will virtually compel the view that Wild and Follington were liars. That is the process of reasoning.

TAYLOR, A-J.A.: How does that touch the issue?

MR. GRUZMAN: Then the question being "Was there a conspiracy?" -

TAYLOR, A-J.A.: No, the question is "Was he influenced by the threats?"

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MR. GRUZMAN: It does not go to that question.

TAYLOR, A-J.A.: If it does not go to that question I have lost interest in it.

MR. GRUZMAN: It goes to the question: Was Vojinovic put into action by Armstrong? From one point of view that is not important. From another point of view it is vital. It goes to that issue. I am reminded by my very learned friend Mr. Purvis it would be a direct answer to your Honour's question to say if Exhibit 29 existed and Barton saw it, that would have a direct influence on his mind.

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JACOBS, J.A.: You say it would actuate his mind, and that is the conventional line on which the case went, but you reserved also for your other point that it would show an illegality, a situation contrary to public policy which would also affect an appeal.

MR. GRUZMAN: That is one way. I can see I have not put over my proposition.

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JACOBS, J.A.: There is a third way.

MR. GRUZMAN: That is that it is circumstantial evidence that there was a conspiracy and that Armstrong was part of it and Hume, if in order to conceal the evidence of the conspiracy they destroyed evidence and they seek to put Vojinovic away - I involve the police in that.

JACOBS, J.A.: I was going to the ultimate conclusion that you take from it, the relevance of it in the ultimate conclusion. You put it three ways. 50

MR. GRUZMAN: Yes.

At page 388 of the chronology I am going to show your Honours a series of complete lies by Follington on a relevant and important matter. "Take Sunday the 8th January, let us take the time after the 3 o'clock phone call ... he appeared concerned but I had some doubt". Here is Follington back pedalling, saying this was not very serious; he was not very worried, there was not much in this at all. He won't agree that he was in genuine fear of his life and safety. "He appeared concerned but I had some doubt ... (reads the next two pages of evidence)". 10

At page 871 line 16: "Listen to the words. I want to have your oath on these words. Did you ever say to anybody Mr. Barton and his family were obviously in fear of their lives? A. No ... you were called on to write a report to the Commissioner of Police ... (over the page) ... they were in obvious concern". That is enough to demonstrate that Mr. Follington is prepared to lie about a serious matter. 20

Why was he doing it? What was the object? Nobody would doubt that Barton was a frightened man at that time. His Honour found so. Why was Follington telling lies about it? There is only one answer. It is because when they decided to stop the investigation they had to undo the work that they had done on the Monday, Tuesday and Wednesday in the investigation. Having done that they had to explain why they did nothing. The only explanation why they did nothing was that they thought there was nothing in it, that the whole thing was just a joke. Every now and again fortuitously we came up against a document. Every piece of documentary evidence in this case supports the plaintiff and the appellant before your Honours. Of course we cannot get over the verbal evidence except in so far as we come across a document. 30

Perhaps I should now go to Lendrum's evidence at page 392 of the chronology. Inspector Lendrum is being asked what they should have done. They are saying they did nothing about Hume until the 18th. 40

Your Honours are aware that the police department actually got their interview with Hume the first and only written interview with Hume, in January 1968. They interviewed Hume about this matter and took the first written interview with Hume 12 months later. February 1968, after this case started, was the first time that a written interview with Hume was obtained by the police department or any member of it according to them. 50

Barton's contention was that within two or three days of the complaint in the normal proper method and following normal police procedure a record of interview was obtained from Hume.

The police would have this Court believe that the investigation of this case was such that a record of interview was first taken from Hume more than 12 months after the incident. It is not worthy of belief by this Court.

Inspector Lendrum's view on it at page 392 of the chronology was this: "Having obtained the complaint from Mr. Barton, and Vojinovic's statement, I would have set about getting some support for Mr. Barton's statement from any person mentioned in his complaint ... I would have lost no time in seeking out Momo and Fred Hume." That is exactly what we say an experienced investigator like Sergeant Wild did. "Would you not expect the investigating officer to have probed alternative views ... wanting his life taken". If you believe the police evidence, nothing the Senior Inspector said was done. They never interviewed Armstrong, they never interviewed any of Barton's associates. They did nothing. A complaint of criminal conspiracy to kill or to demand money with menaces, and not one single step was taken by the police department if you believe this evidence. 10 20

We do not criticise the police. His Honour criticises the police. We do not, not in the way his Honour does. We do not say they were dilatory. We say they acted properly. We say they did everything that a proper policeman would do in the circumstances. When Armstrong got on the job they undid it all. 30

TAYLOR, A-J.A.: When did he get on the job?

MR. GRUZMAN: Sergeant Follington admitted it.

TAYLOR, A-J.A.: What date?

MR. GRUZMAN: The evidence is not clear but I will give your Honour a reference to it. It obviously in our submission was after the 11th January.

TAYLOR, A-J.A.: A matter of inference?

MR. GRUZMAN: Yes. Constable Follington said -

TAYLOR, A-J.A.: Did he say Armstrong got on the job? 40

MR. GRUZMAN: Yes. He told Barton that Armstrong had been down to the C.I.B. and blown his top. That was in one statement. That was Mr. Barton's evidence.

TAYLOR, A-J.A.: I thought you said Follington said. I thought you meant in his own evidence.

MR. GRUZMAN: No. He said it to Barton.

TAYLOR, A-J.A.: It has no value because Barton is disbelieved. It depends on Barton just as Exhibit 29 depends on Barton's evidence. 50

MR. GRUZMAN: And the surrounding circumstances. If it depended on Barton alone, that is one thing. Every case depends on a witness. Whether you accept the witness' evidence or not, the judicial process usually involves looking at the surrounding facts. What do you find? You find the police say they have done everything irregular and improper it is possible to do, and they ask you to believe that, and they are competent and experienced police. That is when you say that supports Barton. Therefore you are impelled to believe Barton. 10

I am taking myself a little out of line, but it will probably help your Honours. Mr. Bainton on behalf of Mr. Armstrong re-examined Inspector Lendrum. Again this is not in the chronology. It appears at page 1954, Vol. 6. I had fairly heavily pummelled Inspector Lendrum upon this matter - not him personally but upon the police investigation. Mr. Bainton then seeks to restore the position. He asks: "Would you assist us if you can by expressing a view whether or not it would be regular or irregular for a police officer who had been present at the Sunday discussions and those others I have read to you not to have taken steps to interview Hume until the 18th January and then not to have taken a written record of what happened? A. I would say that notwithstanding what he had learned from the interviews with Vojinovic the detective sergeant should have interviewed Hume within a reasonable period of the complaint having been lodged ... someone should have interviewed Mr. Armstrong." 20 30

In re-examination Inspector Lendrum is asked: "If it was a member of the Legislative Council? A. Yes, I think he should. This would make me dig my feet in a bit harder ... how many police officers and of what rank would have been sent? A. I would say two police officers ... the more information you have when you see someone the more chance you have of succeeding? A. Yes". 40

The clue to why Inspector Lendrum having those views I did not say even more forceful things if it were possible was that I realised and put to him, and he agreed, that he himself might one day have to sit in judgment on the actions of Wild and Follington. Therefore if he expressed a decided view obviously he would disqualify himself. There is no doubt that he in no way upheld their actions. It was his Honour Street J. who first asked questions along the lines of what was regular, what was a proper method of police proceedings. I followed up, and subsequently Mr. Bainton. It followed from that that everything that Wild and Follington did was from a police point of view irregular or inadvisable. In other words unsupportable. In other words not the truth. 50

Following what was happening on the other side, Barton said that as at the 10th January (page 1/62) he was extremely in fear of his life.

Mr. Bovill said at Page 2/436: "I want you to come to a conversation sometime during January 1967 ... he has now hired criminals to kill him ... you must take this to the police ... Mr. Barton said 'I have already done that'".

On Monday Wild was engaged according to his notebook substantially all day on the Barton and Armstrong investigation. In his evidence he gives this quite inane discussion with Vojinovic as being the subject matter. The one thing that is clear is that he is sitting in his office waiting for Vojinovic to call. It is perfectly obvious in the light of what happened the night before that what was being planned was that Vojinovic would be arranging some method by which they could capture and charge Hume and Armstrong.

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JACOBS, J.A.: Do you want to consider your next step? I noticed you were conferring.

MR. GRUZMAN: I was going to mention some evidence and I am not sure whether it is there. It will take a few minutes.

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(Further hearing adjourned to 10.15 a.m. Wednesday, 3rd March 1971).

IN THE SUPREME COURT)
)
OF NEW SOUTH WALES)
)
COURT OF APPEAL)

Term No. 22 of 1969

CORAM: JACOBS, J.A.
MASON, J.A.
TAYLOR, A-J.A.

BARTON v. ARMSTRONG
NINTH DAY: WEDNESDAY, 3RD MARCH, 1971

MR. GRUZMAN: It would come as no surprise to your Honours to observe that this case falls broadly, like Gaul, into three parts; firstly, the commercial, secondly, the pressure and thirdly, the causing to disappear of the evidence of a police investigation into the aspects of pressure which might be proved - having in mind, as I know your Honours do, Mr. Armstrong's statement to Mr. Bovill that he could cause the police to create or destroy evidence it would be out of keeping with Mr. Armstrong as he has been revealed in these proceedings if in fact there had been a regular and proper police investigation of Mr. Barton's claims. 10 20

Just before coming on to that I think I can deal briefly with the remaining matters that fall within the heading of pressure. I had reached the 8th or 9th January and we come then to the 10th and 11th. I am going to deal with these more specifically in the police context so I will not trouble your Honours too much with it now except to say that Mr. Barton says he saw Hume's statement. 30

TAYLOR, A-J.A.: Record of interview?

MR. GRUZMAN: - - record of interview on 11th, and on the same day I think it was he moved into the Wentworth Hotel.

I venture to suggest that never in the judicial or extrajudicial experience of any one of your Honours have you come across a case where a business man, about to sign an agreement and in that context, left his home and sent his aged parents and in-laws to the country in the way the evidence reveals here. His extreme perturbation is demonstrated very clearly, I think, by not only that - which is probably unique - but also his request for a pistol licence and the co-relative opinion of the police at the time is demonstrated by the fact that young Mr. Barton is taken with Constable Follington to the place to buy a rifle and is then taken to the police rifle range and taught to use it by the constable. So there can be no doubt - of course at that point of time there was no question of proceedings of any kind - that every aspect 40 50

of the matter is documented with the hotel bills and accounts from the Blue Mountains and the Hotel Wentworth. That proved to his Honour, and I am sure to your Honours, Mr. Barton's transcendent fear associated with the signing of this agreement. That continued up to the date of the signing of this agreement and after that he came home and brought his parents back.

That brief account indicates the situation of pressure in relation to Armstrong up to the time that he put his pen to paper for the first time on 17th January. 10

I am going to turn now to this police evidence. In so doing may I first make a couple of points clear? Before Street, J. we criticised the police in the strongest possible terms. The object was to show that they were telling untruths, severe untruths. But it can happen, like Gulliver's travels, where Swift - intending to be sarcastic - found it could be accepted as a true story in itself. It is a risk, because as I take your Honours to the police evidence if I say their conduct resembles that of fumbling village idiot policemen then it could be taken that what I am saying is that is how they acted. But I am not saying that at all. What I am putting throughout these submissions is that you are dealing here with one of the top men in the C.I.B., Detective Sergeant Wild and you are dealing with an experienced detective constable and if you come to the conclusion that their conduct does not measure up to what you would expect of them, then the deduction we ask your Honours to make is that they are not telling the truth. It is our case - I want to make it quite clear - that they acted with all the assiduity and all the competence that you would expect of a very senior detective sergeant in the Sydney C.I.B. and of the man who was assisting him. 20 30

TAYLOR, A-J.A.: You mean up to a point of time?

MR. GRUZMAN: Yes, and every time you find that their conduct appears to fall short of what you would normally and properly expect according to the evidence then we submit you will find this Court is being deceived. 40

One further preliminary matter I would like to mention is this: one cannot emphasise too highly the importance to the understanding of these submissions and, indeed, to the presentation of this case of the golden fact that Mr. Barton happened to get hold of a copy of Vojinovic's statement. It will be revealed to your Honours, I think in the evidence the way this came about. But let me say at once that this was a matter which is probably the matter which brought undone what would otherwise have been probably a complete police denial that there was any substance of any kind whatsoever in Mr. Barton's allegations. The saving factor there was that Sergeant Wild's assistant, Constable 50

Whelan, was not there. So that, fortunately for Mr. Barton, he was not dealing with the team. Constable Follington, as he described it, or accepting my word on it, was dragged in. So Wild and Follington were not a team and each was out for himself.

That is how it came about that due, from Wild's point of view, to the crass stupidity of Follington and unknown to him Mr. Barton came into possession of a copy of Vojinovic's statement. Of course this was denied by Follington, as you would imagine, and Wild makes no bones about his view of it. 10

If I might just deal with this matter out of sequence? At page 808 Sergeant Wild said: "Now, I would like to ask you about another topic. You obtained this record of interview from Vojinovic ... A. No.". I am not concerned with getting it or doing anything with it; nobody had authority to take it. "Can you explain how a copy of the record of interview came into Mr. Barton's possession? ... ". If, as Mr. Barton swore, he got it from Constable Follington the only assumption is that Follington obtained it in a surreptitious and illegal way, according to Sergeant Wild. I asked him, "So far as you are aware as a senior police officer is there any way in which ... A. No. I have not. I do not think it would be worth while". There is an amazing statement! It means that if he had asked Follington he would have assumed that Follington would not have told him the truth. The assumption being that if Follington gave the document to Barton - and he did not even ask Follington about that, there was no point in asking him - he did not make any inquiries, he said, although it is an illegal act which had occurred in spite of the police regulations, and it was an illegal act in respect of these police records. 20 30

TAYLOR, A-J.A.: Are you saying that it was Follington's illegal act, giving it to Barton? 40

MR. GRUZMAN: Yes.

TAYLOR, A-J.A.: Why would he want to do that? Why would Follington go and break into somebody else's locker to do this for Barton?

MR. GRUZMAN: Because Follington was misleading Barton. Follington throughout that year was visiting Barton, feeding him information as to the inquiries that were being made about Armstrong, and obtaining money from him - yes.

TAYLOR, A-J.A.: Are you saying, really, that Follington did this because Barton paid him to do it? 50

MR. GRUZMAN: Yes. It was put by me to Follington that he had obtained from Mr. Barton three lots of \$200 during the course of that year.

TAYLOR, A-J.A.: Did Mr. Barton give evidence that he paid that money?

MR. GRUZMAN: I think he did.

TAYLOR, A-J.A.: Barton was bribing him?

MR. GRUZMAN: Not bribing him. The way it was put by Barton - -

TAYLOR, A-J.A.: What else is it if you give a policeman some money to do something that is improper?

MR. GRUZMAN: According to his evidence he said that he asked Follington for a copy of the document and Follington came and brought it to him, but there was no question of money at that time. Then he said that Follington said, "I have got four days off a week. I am prepared to investigate Armstrong on my days off". It was suggested that he in fact go down to Goulburn, which he did, to make investigations in Goulburn on the Goulburn matter that your Honours have some knowledge of, on behalf of Barton, in his days off. During the course of the year these three sums of \$200 were paid and in fact, as I shall show your Honours shortly, he then went to Mr. Barton's solicitor, Mr. Bowen, and went to his home. 10 20

TAYLOR, A-J.A.: There is clear evidence that Barton was paying the police, and the evidence that Armstrong was paying them you say should be inferred?

MR. GRUZMAN: Yes, and inferred from irrefutable facts. We are dealing here with these two police officers and I do not want to go off the point. The point is how this document came into Mr. Barton's possession and the opinion which each police officer had of the other. Sergeant Wild said it would not have come into the hands of Mr. Barton in a proper way, it was illegally removed, but he did not think it would be worthwhile to make inquiries. I asked him, "Did you think the person responsible would deny it? A. I am sure". That is one police officer talking about another. "If the person responsible was a police officer you would regard him as having committed an illegal act? A. Yes... and removed without your permission? A. Yes". So here we have the officer in charge of the case talking about the other officer as a person who has committed an illegal act and would tell lies about it. 30 40

I am going to take your Honours if I may to the evidence as I go through it, and some of the evidence in the most convenient form appears to be in Volume 3. We have made our position clear about Inspector Lendrum. In other words, we say that anything Inspector Lendrum did he did in good faith and in the interest of justice and the fact is that his Honour accepted him as truthful and 50

honest. But just in case that suggests to your Honours something less of Mr. Barton then I would just read a couple of passages from the evidence at page 702.

TAYLOR, A-J.A.: Did not you say a moment ago if it had not been for the fact that Barton got a record of interview from Follington it would have been suppressed?

MR. GRUZMAN: Yes, probably.

TAYLOR, A-J.A.: Of course, if you say that you implicate Inspector Lendrum by implying that he knew it had been taken. 10

MR. GRUZMAN: I agree, but on the other hand Inspector Lendrum left the case that night. He knew something was being done but he never read the record of interview.

TAYLOR, A-J.A.: He knew it was being taken. He went round there while it was being taken.

MR. GRUZMAN: Yes. On the other hand he would not know whether it was ever completed. There is no evidence, so far as I can remember, that he ever knew it was completed. Of course that is one implicating Armstrong in the way it does, and it may never have seen the light of day. There were several statements taken from Hume, on any version: one on 18th January and one in February, 1968 and Inspector Lendrum - - 20

TAYLOR, A-J.A.: There was no statement of the 18th.

MR. GRUZMAN: There was a conversation. 30

TAYLOR, A-J.A.: But there was no statement or record of interview.

MR. GRUZMAN: Hume's version was taken by the police on 18th January.

TAYLOR, A-J.A.: By Wild on his own.

MR. GRUZMAN: Yes. I am only saying that if this Vojinovic statement had disappeared and another one had been substituted Inspector Lendrum would have been none the wiser. Inspector Lendrum went this far - and I am not suggesting it has anything to do with this matter we are speaking of - Barton said "I spoke to Inspector Lendrum after he came out of the interview room and he said 'The man has admitted your allegations, as you say'". Inspector Lendrum said that he did not say that at all but said that at the stage he went in there he did not know what was going on and Wild did not know how the interview would end up. So far as Inspector Lendrum's position was concerned that night, he would have been in no position, as he said, to be able to say just what Vojinovic had said. 40 50

Thereafter he went on to other duties. It happens that the Vojinovic statement exists, and exists because Follington gave it to Mr. Barton, and if it did not then Mr. Barton would have had a much more difficult case than he has got.

That matter will arise again. I was going to refer your Honours to page 702 where Inspector Lendrum is giving evidence and there is put to him in his evidence in chief: "Alec said I should bring £500 with me and I have been instructed by Mr. Lendrum and Follington ... I would have the money with me". So Barton's evidence at that point was that he was instructed by Lendrum and Follington that he should promise to bring the money with him. Then it is put to him in chief by counsel: "Did you at any time ever instruct or advise or suggest to Mr. Barton that he should promise this man Alec money? ... it would not be proper in those circumstances to suggest it". His Honour, Mr. Justice Street, was not very satisfied with that and then asked some questions of the Inspector. I won't take your Honours right through them because they are lengthy questions, but what he said at page 703, from line 19, in the course of an answer to his Honour was: "If a situation arose in which it would be desirable for money to be taken anywhere by Mr. Barton for the purposes possibly of obtaining evidence that would be a matter I would discuss with Mr. Blissett and he would discuss that Mr. Allan ... it would have been produced from another source". This is a rather remarkable thing. We are dealing with the Sunday afternoon and Inspector Lendrum says that he would not even tell Barton to promise to bring the man money without having discussed it with Mr. Blissett and the Commissioner, Mr. Allan. That is apparently the police regulations. Then his Honour went on and said, "I do not for the moment ..."

TAYLOR, A-J.A.: That does not involve the police, the other one does.

MR. GRUZMAN: I quite agree, entirely. I only point out that Inspector Lendrum starts his evidence by saying, "Look, I would not even be a party to a man promising to give money to a petty criminal in those circumstances. It would be quite improper" - and then ends up by saying to his Honour, "There was nothing wrong in it".

So whilst his Honour accepts Mr. Lendrum - he had the advantage of observing him in the witness box and so on - having in mind all the circumstances: the difference between them on those points is so slight and Mr. Lendrum's evidence is itself (shall we say) unsure and whilst his Honour was entitled to take the view that he did, it should not in your Honours' minds tell at all against Mr. Barton.

At page 705, line 23, it was put to him that

Mr. Barton had said, "Did you say this to him or anything to this effect ... a long time with him". There is the answer, I suggest, to your Honour Mr. Justice Taylor's comment on that aspect.

Then he said, "that Barton was in danger ... I did not see it". In all the circumstances his Honour accepts Mr. Lendrum but it does not tell against Mr. Barton if Mr. Barton understood Mr. Lendrum to be saying that or something like that.

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"Did you say words to him ... just what I said I could not recall now". Then at page 707 (line 36) he was asked had he tried to obtain this record of interview which Mr. Barton said he saw: "What was the result ... accompany you? A. No".

These are just a few aspects of Inspector Lendrum's evidence from which I would ask your Honours to draw the inference that on Inspector Lendrum's evidence, even if it differed from Mr. Barton's, there was ample room for a very genuine difference.

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It is a different matter when we come to Wild and Follington. At page 716: "This fellow Alec was to meet you outside St. Vincent's Hospital, is that right? A. Yes ... what he has done for me". You can just imagine that at this point of time. "I said 'under no circumstances are you to give this man any money ... I feel that is his object in meeting you'". That is untrue. That conversation in that form could not have taken place. On this unimportant matter we had Follington - but your Honours will see that he spent some six hours at Barton's house that afternoon and the arrangement was made, and Wild, as he said at line 23, "Follington was standing near St. Vincent's Hospital ... reached Follington". Then he said they did not see much of it and then they went to the C.I.B.

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At page 718, dealing with Vojinovic's statement, "When he was finished who took custody of the copies - - ". Your Honours may recollect that in answer to our subpoena to the police department, which was quite specific and described the folder, the folder was produced on subpoena but empty and it became Exhibit "Q". "When you put these things into the folder ... was on annual leave, Detective Whelan". Then he gives evidence, and I won't take your Honours through it in chief because it is dealt with in cross-examination, about seeing Vojinovic the next day.

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I will remind your Honours that Mr. Barton's evidence was that this matter was taken so seriously by him and by the police that he saw Sergeant Wild and, I think, Follington, I think it was, the next day - on Wednesday, 11th - and said "I want to buy a pistol for self-protection". I do not need to

inform your Honours what the procedure is, but the local sergeant at the local police station has to issue a pistol licence; with some knowledge, of course, that pistol licences in this State are not easily issued. So if you wanted to get a pistol in those circumstances, the man to have seen was Sergeant Wild who knew all the facts and circumstances. Sergeant Wild rang, he said, the police station to seek to arrange the issue of a pistol licence - according to Mr. Barton. But later on, with all this back-peddalling - he has to explain away this phone call and this is his explanation. He said that he obtained the record of interview with Vojinovic, and at page 722: "It was in my locker, in my own room ... see the licensing sergeant there". The only significance of that is that here is Sergeant Wild trying to explain how it was that a senior detective sergeant of the C.I.B. rang Chatswood Police Station about a pistol licence for Barton. Could anyone imagine that he would have done that if he had believed it was a silly thing to do? We go even further and say, particularly to your Honour, Mr. Justice Taylor if we may, that Follington had gone to the rifle shop to buy the rifle, and if that was the situation when he had said it was a foolish thing to do, let alone a pistol -

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TAYLOR, A-J.A.: I do not follow that. Why should not a police sergeant say, "I do not think you need a pistol, but this is the way you go about it and I will ring the licensing sergeant and tell him you are coming"?

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MR. GRUZMAN: If you believe that.

TAYLOR, A-J.A.: Why would not you believe it?

MR. GRUZMAN: First of all, Mr. Barton speaks to the sergeant, and secondly, it is improbable.

TAYLOR, A-J.A.: Why is it improbable?

MR. GRUZMAN: If he said he wanted a pistol he would have said "Go away, don't be childish".

TAYLOR, A-J.A.: This is you talking, not the evidence. He did not say "Go away and don't be foolish". You say there is an inference to be drawn because it is inherently improbable? I do not see anything improbable about it at all.

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MR. GRUZMAN: It depends which way one looks at it.

TAYLOR, A-J.A.: That is true. Both views are well open.

MR. GRUZMAN: At this point of time, yes; but not - I put - when I have finished my submissions to your Honours, I hope.

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Looked at from the way we put it; Wild has to explain one thing - how it had come about that

he made this phone call. He was then forced into a situation of saying that he had made the phone call although he thought it was the wrong thing to do. The best you can say for his action, in fact, was that either he thought then it was a good idea for Barton to have a pistol licence, or the worst you could say about it was that he thought obtaining a pistol licence would allay Barton's fear. But there will be more on that.

Just following on that, he goes on: "Was there any discussion of money? A. Yes, there was ... in the first place". We put that that is utterly untrue. He was forced into that because he paid the money himself to Vojinovic, as Vojinovic swore, and Mr. Barton swore that he paid money to him for that purpose. So he has got to, and is forced and forced and forced into the position of saying, "There is no need for money, so do not pay money to him", because the whole object of the exercise was that this man Vojinovic was going to lead them to Armstrong and he would not do that obviously except for money. Then, on the next page, "Was Mr. Armstrong mentioned by anybody ... I do not recall whether he mentioned Mr. Armstrong".

TAYLOR, A-J.A.: It was Barton who said it would be all over on the 18th?

MR. GRUZMAN: Yes.

JACOBS, J.A.: I rather read that the other way around, although I do not think it means a great deal. However, it is very difficult to know.

MR. GRUZMAN: Yes, but whichever way one looks at it the 18th was mentioned. There was never any contemplation on the 11th or the 18th, never at that time did anyone contemplate the 18th. At this stage it is the 12th or 13th at the latest.

JACOBS, J.A.: That is an error that could have occurred in recollection.

MR. GRUZMAN: Well, we say it is not insignificant.

JACOBS, J.A.: What significance do you take from that? I would have thought myself that you would be relying very heavily on this sentence - you would not be showing a great deal of concern about the date.

MR. GRUZMAN: Your Honours will find in checking over our submissions where they appear on the surface to be for or against us, we are trying to refer your Honours to the evidence and the proper inferences from the evidence and leaving it to your Honours to work out the result. All we say at this stage is that it is impossible, on that conversation in that form, that that conversation in that form could have taken place.

JACOBS, J.A.: Do you say anything like it took place?

MR. GRUZMAN: I would not accept anything, with respect, that Wild said - whether it was for us or against us. We are making the submissions here and can only make our submissions as we see it. We say Wild is incapable of credit, whether it is for or against us. No matter how that passage appears to be in our favour in the light of the case we say that is a manufactured passage by Wild and it is a coincidence if it ever took place and it does not matter, and the 18th could not have been said. We will show your Honours in a moment that Wild is such a liar through and through and through that in the end we submit your Honours won't believe a word that he or Tollington says. 10

But I am putting to your Honours the evidence in chief of Wild at the moment, showing his explanation of everything. Then he said he went to Kings Cross and, your Honours will have it in mind, at twelve noon he went to the Potts Point Post Office and met Vojinovic. This is supposed to be the conversation by this senior detective sergeant who left his office and went by police car to Kings Cross and met Vojinovic: Vojinovic said to him - "I have got to appear at Central on the 16th ... that I think is the context of the conversation I had with him on that occasion". It falls by its own weight. It is impossible that a senior sergeant at the request of a petty criminal went up to Kings Cross to have that conversation. The problem was that his diary showed that he went up there on that day so he had to give some conversation. But the diary does not say that he paid \$300 to Vojinovic. 20 30

TAYLOR, A-J.A.: The only evidence that he paid \$300 is from Vojinovic. Barton said that he paid Wild \$400.

MR. GRUZMAN: What have you got against it? Who could believe that this conversation occurred with the senior detective sergeant driving up to Kings Cross to talk to a petty criminal along those lines? 40

TAYLOR, A-J.A.: You ask who would believe it. Why should not we believe it? I do not know how many police officers he knows. Why should he not drive up there. It does not affront my knowledge of the police force because I have no knowledge of them, but why should we believe that it is not right? Because you say it is so? 50

MR. GRUZMAN: We say it is improbable.

TAYLOR, A-J.A.: Why would not a police officer drive to Darlinghurst to talk to a criminal if he wants to?

MR. GRUZMAN: Fair enough, but look at the two

possibilities. On the one hand the allegation that the plaintiff makes is that he paid \$400 to be paid to this criminal, so he would lead him to Armstrong, and the criminal says Yes, and on that particular day at that particular time and at that particular place - before we had ever seen Wild's diary - Wild made the appointment and came up to see him at Kings Cross and gave him \$300 for that purpose. Subsequently it turns out that Wild's diary is produced and, lo and behold, there is an entry there "saw Vojinovic" at that time and place. Which is the most likely of the two: the first one, that Wild did go specifically to see him and give him the \$300, or that they had a conversation which (A) they could have had over the telephone or (B) was a conversation about anything? 10

TAYLOR, A-J.A.: It was a bit more than that. At the same time you say that he stole \$100 for himself?

MR. GRUZMAN: Yes. 20

TAYLOR, A-J.A.: What about putting into the probabilities that he had been twenty years in the police force, that he was a distinguished and responsible officer and he was putting his faith in the hands of a hoodlum who was known to the police - with a record? What about putting that in the balance?

MR. GRUZMAN: There is no evidence at all that he was distinguished. I know what your Honour meant, but do not let us get the terms mixed up. 30

TAYLOR, A-J.A.: Competent and well-thought of?

MR. GRUZMAN: I do not know about well-thought of, but competent.

TAYLOR, A-J.A.: I do not understand your vehemence. Is it that you did not get value for the money that you paid him? He paid to Follington \$200, not to give to anybody else, and then you make this vehement attack. There is almost the impression that he did not get value for his money.

MR. GRUZMAN: He was misled. He was led up the garden path. 40

TAYLOR, A-J.A.: This seems to me to be a lot of conjecture and if you want to conjecture about the relationship between Barton or Armstrong and the police officers, it can never get beyond the field of conjecture.

MR. GRUZMAN: If your Honours would bear with me. There is one thing, as I understand, that one can submit to the Court and if I can show that that plain straight-out lies were told in the witness box by witnesses - - 50

TAYLOR, A-J.A.: That is grounds for not accepting

that evidence, but you want us to go further and make a firm finding that these police officers suppressed evidence, presumably because they were paid?

MR. GRUZMAN: Yes.

TAYLOR, A-J.A.: And there is not a tittle of evidence that Armstrong paid them but you want us to assume that or draw that inference?

MR. GRUZMAN: You are not going to look for a contract or a receipt, I put rhetorically, in a matter such as this. 10

TAYLOR, A-J.A.: That is a matter of inference, and it is a grave matter to draw an inference that a police officer was bribed.

MR. GRUZMAN: It is a grave matter.

TAYLOR, A-J.A.: I would not draw such an inference unless it was proved to me beyond reasonable doubt, even in a civil case.

MR. GRUZMAN: I accept everything your Honour says and I fully appreciate - - 20

TAYLOR, A-J.A.: I have not been able to find anything in this case to justify that charge.

MR. GRUZMAN: Your Honour has not heard me yet.

TAYLOR, A-J.A.: I will not make findings on that kind of submission when I have not seen the evidence.

MR. GRUZMAN: His Honour, Mr. Justice Street, never made any finding on it, so nobody - if I may say so - has ever drawn out of the mass of evidence which is before this Court matters relevant to that and that is what I am seeking to do. What I am seeking to do now is to invite your Honours' attention to these specific matters in the evidence which we say on the one hand enables your Honours to, and on the other hand demand that your Honours should, draw an inference. 30

TAYLOR, A-J.A.: If the money were paid it would be paid by somebody. It had to be an ascertainable sum of money.

MR. GRUZMAN: There, if I might disagree with your Honour, if your Honour would allow me to continue, then in the end - - 40

TAYLOR, A-J.A.: All you want to put up is that Wild was a liar, and Follington was a liar and not to be trusted. Even if I were disposed to accept that - and I am speaking only for myself - that does not prove that they got money from Armstrong. It does not even get off the ground.

MR. GRUZMAN: I understand the way your Honour is putting it, but supposing that assumption were made, which you had to consider as between Barton on the one hand and Wild on the other, whether the Hume (sic) statement existed, and upon the assumption that Wild was a liar - -

TAYLOR, A-J.A.: We are talking about money, because that is the matter on which Mr. Justice Street made a finding.

MR. GRUZMAN: I have to develop this. I am only doing this for the purpose that if I can convince your Honours that Wild and Follington are people whose evidence is not to be accepted, and that is by an examination of matters which Street, J. did not examine, and then you come to that conclusion which your Honour suggested, you then reconsider Exhibit 29 and say, "On the one hand we have Barton who might be inaccurate but is honest; on the other hand there are the two liars", then your Honours would be disposed to say, "His Honour Mr. Justice Street did not consider these matters about Wild and Follington as to their credit". He did not make findings on the matters I am speaking of. So your Honours would then, we would submit, re-examine Exhibit 29 in the light of the evidence of Wild and Follington and then if you came to a conclusion on that affirmatively that it did exist (as we submit your Honours could) then that again will determine in part and assist your Honours in coming to the conclusion whether Armstrong was a party to the main conspiracy.

TAYLOR, A-J.A.: What about evidence that he paid money to these people? Where do we get that? You said you were going to show some evidence of it and you would ask me to find that Armstrong paid money to the police and that was the reason for their, amongst other things, suppressing this document. Is there any evidence?

MR. GRUZMAN: If your Honour means is there any evidence of specific money paid at a time or place, there is not.

TAYLOR, A-J.A.: Or by any person?

MR. GRUZMAN: Or by any person.

TAYLOR, A-J.A.: You want me to find this, that these people accepted bribes from Armstrong in dereliction of their duty? That is the sort of inference?

MR. GRUZMAN: Yes. In the same way that nobody ever gave any evidence that Mr. Plonk laid a hand on his wife. There was not a tittle of evidence that Mr. Plonk laid a hand on his wife or played any part in her death.

JACOBS, J.A.: But she was dead.

MR. GRUZMAN: Here, exactly; the evidence was suppressed but the corpus delicti exists.

TAYLOR, A-J.A.: What about evidence of money? There is no evidence that they got money.

MR. GRUZMAN: There had been no evidence that Plonk held his wife under the water.

TAYLOR, A-J.A.: I think you have been answered on that. Somebody held her under the water and she died.

I think there is an obligation on you to show credible evidence from which I can say that Armstrong paid the police money. If you cannot do that you ought to withdraw the submission. 10

MR. GRUZMAN: That is not so, with respect. That is what I am not getting across to your Honour, and I know it is my fault. The corpus delicti, if you like, is the fact that evidence was destroyed. If you come to the conclusion that the evidence was destroyed it does not matter that you cannot on the evidence find the exact means or machinery by which it was done, any more than it was necessary to find the exact means or machinery by which Mrs. Plonk was killed. This is a circumstantial evidence case, and we propose to produce it in that way. 20

TAYLOR, A-J.A.: You will never be able to point to any witness who swore it or any document which shows it, as I understand your submissions, or any direct evidence that these police officers were given moneys by Armstrong? 30

MR. GRUZMAN: No. The same as in many criminal cases where there is not a word of direct evidence and it is all circumstantial evidence, and many a man has hanged - -

TAYLOR, A-J.A.: That won't help you. I am well aware of the doctrine of circumstantial evidence and I have had a little experience in applying it.

You never even put to these police officers that Armstrong paid them money. You never gave him an opportunity of denying it? You never put it to him that he destroyed Exhibit 29, either at his own behest or Armstrong's behest? 40

MR. GRUZMAN: A little more than that.

TAYLOR, A-J.A.: You never put to him that Armstrong paid him money? Cannot you answer that question?

MR. GRUZMAN: No.

TAYLOR, A-J.A.: And you would ask me, without giving him the benefit or opportunity of denying it, to find that against him? 50

MR. GRUZMAN: I can only put to a witness those matters that my specific instructions are framed on. Since I did not have in my brief a statement that Mr. Wild was paid so much money on such and such a day by Mr. Armstrong I could not very well put the question to him. So in the ordinary course of events you would not expect to find that question, where it is going to be a matter of this kind. I do not know, for that matter, who paid the money; whether it was Armstrong or who, or how much, or when and what he was promised. 10

TAYLOR, A-J.A.: If you do not know that, what right have you to make such a charge?

MR. GRUZMAN: Because it is a matter of circumstantial evidence and it does not matter whether - -

TAYLOR, A-J.A.: If you are going to do it, I think it is wrong of you to do it, but it is your business, not mine.

MR. GRUZMAN: It is mine, your Honour. If counsel were cross-examining Mr. Plonk, would he be entitled to say "You throttled your wife"? 20

JACOBS, J.A.: Yes.

TAYLOR, A-J.A.: I think he would be.

MR. GRUZMAN: He would not have it in his brief.

JACOBS, J.A.: If the issue in the matter was whether he did or not.

MR. GRUZMAN: If all we know is that she drowned and did not know whether she was throttled first or held under the water or pushed out of her depth or anything of that kind, is counsel justified in asking the question "Did you push her out of her depth?" when you have no way of knowing? 30

JACOBS, J.A.: When there is a prosecution case?

MR. GRUZMAN: The prosecution case is that she met her death, but the precise way is not known.

JACOBS, J.A.: A res ipsa loquitur in a criminal matter?

MR. GRUZMAN: That is what in fact it is, and that is what we ask your Honours to decide in this case - res ipsa loquitur. 40

JACOBS, J.A.: I feel I should say this: it is for you to abide by whatever the rules are but your enunciation, as I understand it, was this - that counsel is not entitled to suggest the commission of a criminal act in cross-examination without instructions. Is that it - he should not do it?

MR. GRUZMAN: No, not at all, your Honour.

JACOBS, J.A.: What was it?

MR. GRUZMAN: What it was was this: we were suggesting in the clearest possible terms that the evidence had been destroyed, and destroyed wrongfully, and I have put that already, without questions. The only question is, if I had any particular instructions about a particular sum of money being paid by X to Y that certainly there was no necessity - and probably it would be wrong, I do not know - for me to say something I knew nothing about - that, for example, A paid B £500. 10

JACOBS, J.A.: My point is that a fortiorari you can never suggest it if you do not ask him about it, but I am not going into the ethics of the Bar. That is a matter you have to look at.

MR. GRUZMAN: I have no difficulty with that.

JACOBS, J.A.: There is much to be said of what my brother Taylor put to you and I do not wish to be taken in the least degree to be assenting to what I regard as quite a strange distinction between putting questions in cross-examination and putting them in submissions. 20

MR. GRUZMAN: I have no difficulty whatever in submitting to this Court that if it finds, that as a result of circumstantial evidence something was produced by A then I would have no difficulty at all in submitting the possible - -

TAYLOR, A-J.A.: I can well understand that you have no difficulty, but the thing that concerns me is whether it is proper or not. 30

MR. GRUZMAN: I am quite satisfied it is quite proper, your Honour.

JACOBS, J.A.: I do not wish to prolong the discussion on that because I feel there is little in this matter we can rule on. But I do feel it is a most extraordinary suggestion, that you are free to allege that a man has committed a serious criminal offence - without the support of evidence - and you say that without instructions you are not free to ask him whether he did or not. 40

MR. GRUZMAN: That is not the fact.

JACOBS, J.A.: That is what you have been putting.

MR. GRUZMAN: No, that is not the fact. I realise I am perhaps not making myself as clear as possible. Let me say clearly that I allege that A by some means or other produced event B, and that is what I submit. On the other hand, although I have got circumstantial evidence to prove that A produced B in some way or another, I have no evidence as to the precise machinery by which A produced B. 50

All I am saying is this - perhaps I could have asked a question suggesting possible forms of machinery but certainly there was no necessity for me to suggest possibly precise forms of machinery. But certainly also, when I come to this Court I can say to your Honours, "I allege that by circumstantial evidence you will decide that A produces B, and the only possible means by which it was done was 1, 2, 3, 4, 5 or 6", and that is exactly what I am doing.

10

TAYLOR, A-J.A.: You cannot say whether or not Armstrong procured this by giving him money? You cannot say that - you have just admitted that. You said in this Court publicly half a dozen times that you will prove that Armstrong bribed the police.

MR. GRUZMAN: What I said was this, that he procured it. He may have procured it in various ways, but it will be for this Court - if the Court came to the conclusion that it was done in another way - supposing the Court came to the conclusion that Armstrong procured - -

20

TAYLOR, A-J.A.: You said to me in the last quarter of an hour that you would prove that Armstrong paid money to the police. Are you going back on it now? You say you cannot prove it?

MR. GRUZMAN: Nobody is going back on anything. I really cannot see the problem. A we allege produced B. He may have done it in twenty different ways. The most obvious way of all is the way he used in the past and the way which he conceded was a method with which he saw nothing wrong: that is, bribing the police. I will ask your Honours in the end, if you come to the conclusion that Armstrong procured the destruction of this evidence, that as part of the conspiracy, you will come to the conclusion that he did it in the same way - and the most likely way - I have suggested.

30

TAYLOR, A-J.A.: That is not what you said to me in the last quarter of an hour. You told me in the last quarter of an hour that you would ask me to make an affirmative finding on the evidence that Armstrong paid money to the police. That is what you said.

40

MR. GRUZMAN: That is right.

TAYLOR, A-J.A.: Now you are going to ask for that, but I thought you just said a moment ago that he may have done it in half a dozen different ways but you cannot say which.

50

MR. GRUZMAN: That is right, but the most obvious one - -

TAYLOR, A-J.A.: Do you think that justifies you in asking me to find that the police were bribed?

MR. GRUZMAN: I certainly do, your Honour.

TAYLOR, A-J.A.: You do?

MR. GRUZMAN: Certainly, and the evidence shows - -

TAYLOR, A-J.A.: So far as I am concerned, the matter is closed and I do not want to say any more about it. I form my own views.

MR. GRUZMAN: Your Honour formed your Honour's views a long time ago.

I am now going to page 724 at line 9, Sergeant Wild's evidence in chief, "When next did you do anything or speak to anyone in relation to the matters which were commenced on the Sunday morning ... Frederick Hume". So it appears from that it was the Wednesday when he saw Vojinovic, that is the week Sergeant Wild did nothing from 11th to 18th, and then he was asked "Did you arrange that interview? A. Through Detective Follington I did. I asked Follington to make arrangements ... on the 18th". Then he said there were some notes in his official notebook, he was there about twenty minutes. He did not transcribe them. "Did you, apart from that conversation, interview Frederick Hume in connection with this matter? A. No - - arranged that interview ". He was there a quarter of an hour. 10 20

This is an experienced sergeant of police who does nothing for a week and he runs around Monday, Tuesday and Wednesday, but does nothing for the week. He sees Hume and asks Hume to bring him the other conspirator. This is supposed to have been the investigation. Again I say I am not criticising the investigation. I am saying that the Court is being regaled with untruths, one after the other. 30

Then at page 725 in relation to Ziric, he said, "I recorded his name in my official notebook. I do not think there is ... written record made". Then he said he spoke to both Mr. Lendrum and Superintendent Blissett, but nothing in writing. 40

So, here is a man who goes to the police, supported by senior legal representatives, and sees the chief man at the C.I.B. and - according to the police - here is the investigation: no statement ever taken from Hume, no statement ever taken from Ziric, no detailed statement ever taken from Barton, no inquiry from Armstrong - nothing.

JACOBS, J.A.: You would not expect to find records of interview. Apparently they are reserved for people who are projected as accused persons. You would not expect to find records of interview apparently with Mr. Barton. 50

MR. GRUZMAN: That is not what Inspector Lendrum said. Inspector Lendrum's evidence is exactly the contrary of that.

JACOBS, J.A.: That they take records of interview from any person?

MR. GRUZMAN: He said they go on a fact-finding commission, they interview and record everybody who can give them information, and this is the proper method of a police investigation - including Barton and Barton's friends.

JACOBS, J.A.: I did not think it was one of those question and answer documents which are produced. That is what I was referring to. I was wondering whether it was the same procedure in relation to witnesses. I do not think it is. I think a witness first has his statement written out or typed out, and he may or may not sign it according to what the police decide. 10

MR. GRUZMAN: I was not adverting to the difference in verbiage.

The next matter opens up in chief a circumstance that we submit your Honour is going to find significant. What we had done was to have in Court Detective Mengler from Victoria. They knew that we had found out about what had happened in Victoria and that we had Detective Mengler there as a possible witness. He gave his evidence in chief compelled by that circumstance. At line 32 page 725: "When did you next hear about Vojinovic? A. After the 27th January ... (reads on to page 726) Where was that? A. At Mr. Gruzman's chambers". Line 33: "Did Mr. Lendrum say this is a serious matter". It is amazing that Mr. Barton should use a phrase which is obviously a police phrase, known to the police as "dogs". I do not know whether any one of us in this Court had heard that expression before in that context. It is an amazing thing that Mr. Barton used it. Follington knows that is what shadows or police in disguise are called in the police force. 20 30

On the record of interview perhaps I could give a reference to Mr. Lendrum's evidence at page 1942 line 20: "I would say it would have been most desirable had a record of interview been obtained from Hume at the time he was approached during the original investigation, whether it be a day or two or a week afterwards". Line 31 on page 1943: "I would have expected Sergeant Wild to have made a record of his interview with Hume unless there were good reasons why he did not or could not at that time ... Q. The same would apply to an interview with Novak? A. Yes". 40

Page 2394, Exhibit "MN", which is the interview between Detective Sergeant Butler and Frederick Hume on the 5th February 1968; that is 12 months later. 50

JACOBS, J.A.: How did that come to be taken?

MR. GRUZMAN: We do not know. The case started,

and lo and behold they interviewed Hume about the events of 13 months before. At the same time Hume made an affidavit which he deposited with the police a couple of days later.

His version of it at page 727, line 10: "Did you at any time say to him that this man Alec or Vojinovic had admitted everything and he had been let go ...".

JACOBS, J.A.: These are denials.

MR. GRUZMAN: Yes. "I never advised him to purchase a pistol ... (reads on to page 728) ... I do not think it would be terribly difficult to obtain a key to someone's locker". 10

Turning to page 731, line 18: "Assuming there was a complaint which led to a charge being preferred? A. It would be a conspiracy of murder if it was correct ... You were then directed to investigate that complaint? A. Yes". Then his Honour asks a question on that. He said there was nothing said in Lendrum's office which caused him to doubt it was a valid complaint. He is back-peddalling. I said "I want you to be very careful. You told his Honour that there was something which at the time caused you to doubt it was a valid complaint ... I submit this was an attempt by a man to obtain money from a businessman by some threats ... ". The detective sergeant is investigating conspiracy to murder or demanding money with menaces. The whole of the paraphernalia of the police force should have been flung into action to catch that man, and it was. Everything that proper police ingenuity and expertise could devise was used to ensure that Vojinovic was caught. Wild does not want to say that. I have to force it out of him that he wanted to catch this man. He is saying we did not really want to catch him; all we wanted to do was ask him. 20 30

Line 22: "At the time of the making of that complaint the possibility of that man being in your office in the near future was very much in the air ... it was in the interests of justice that the man should be caught? A. Interviewed". He won't have it that he wanted to catch him. He wants to call it an interview. There is only one reason, and that is to lay the ground for the alleged future inaction. 40

JACOBS, J.A.: He says a little later that he felt Mr. Barton had put himself in a position of offering money rather than it being demanded off him. 50

MR. GRUZMAN: That is not what Vojinovic says.

JACOBS, J.A.: That is what Sergeant Wild says.

MR. GRUZMAN: This is Sergeant Wild trying to explain the volt face. in his actions. Anyone can say

anything. Actors on the stage say things. We believe it at the time and go home and think it was only a play after all. That is what Wild is going through; nothing different.

"You did not think you could ring up this man and he would come and tell you all about it? A. He may". He says that is his honest view. All the machinery goes into force. Follington is there for six hours. It probably cost the police department hundreds of dollars to get this man. Then I put to him: "Do I understand it had been Follington's job as your partner in this matter to do all in his power to see that the man was captured? A. Yes ... You would not expect him to keep his appointment? A. I do not know". That is obviously an untruthful answer. He says if he had rung up Vojinovic and said "You are going to get no money and you are going to get caught", he would still keep the appointment. That must be an untruth. It must be a deliberate lie. Why would Sergeant Wild tell even one deliberate lie? It only takes one deliberate lie to realise that Sergeant Wild is embarking on a campaign and for a purpose. He says that is a serious answer.

I repeated the question: "As a police sergeant of 28 years do you say that you would have expected Vojinovic to keep the appointment ... A. I would say that Vojinovic would not have kept the appointment had he known the police were going to be there". Now he changes his answer. One or other must be untrue.

"Was it not your view throughout that Vojinovic wanted money ... no evidence of any offence". That is a simple matter of looking at the statement where Vojinovic says that he entered into a conspiracy to murder Barton. It is ridiculous and untrue that Detective Sergeant Wild could have believed that that record of interview provided no evidence against Vojinovic. There is another deliberate lie. Why? Because he has got to explain why he took no action against Vojinovic. They did not even bring Vojinovic back to this state to face his trial for break enter and steal from which he absconded. Nobody wanted Vojinovic. They have to explain why they did nothing. Wild has to explain. So you go from one absurdity to another.

I took him through the record of interview: "Did you not regard that as an admission by Vojinovic that he had asked Mr. Barton for £500 ... in this instance I did not think it necessary".

JACOBS, J.A.: We know what the judge said about it.

MR. GRUZMAN: It is one lie after another. There is only one reason for it. The reason is that something serious has to be covered up. If the assertions of the appellant are correct, what a

serious state of affairs this is. If by some means or another it was procured that evidence should be destroyed, what a serious matter it is. Would you not expect extreme lengths to be taken to cover up? Would you not expect that when the matter was revealed in Court the people responsible would have to lie, that at some point or another they would have to tell lies? Here it is before your Honours. There is no question of demeanour here. We can assume he had the finest demeanour in the world. What is he telling? He is telling your Honours things which are obviously untrue. 10

He goes on: "From that point of time when you had the statement from Vojinovic containing those admissions, why did not you think it necessary to get a detailed statement from Mr. Barton ... it has only just occurred to you that Vojinovic could conceivably have been guilty of seeking to obtain money by false pretences? A. Yes ... That is your usual method? A. Yes". Would this man have acquired a reputation as a competent police investigator if that were true. Could he have been 28 years and risen to a senior position in the C.I.B. if that were true? It is obviously a pack of lies. Every word of it is lies. Nobody, and certainly not a police officer of this calibre comes to a Court and swears lies without a very cogent motive. His Honour, Taylor, J. said when you consider what is involved for him if he does something wrong, then what was behind it. The motive must have been very strong. It is entirely a matter for your Honours. Do you believe these statements by this senior police officer or not. If you do not, and we submit you should not, then your Honours should so find. 20 30

I asked him: "It would not have anything to do with the fact Mr. Armstrong was an M.L.C. ... are you saying that you were unable to find Momo? A. I never tried ... would not you have thought that a man who had convictions for breaking entering stealing and also for carrying a gun might be the sort of man that would demand money with menaces ... it sort of escaped you? A. Yes". Every answer is untrue. 40

Running through this you will find the other big advantage that Mr. Armstrong had in using Hume. Hume had three major advantages. He was the link pin in the conspiracy. First of all Armstrong trusted him, a close relationship. Secondly, his connection with the underworld, a man who dealt with and hired criminals and so on. Thirdly, and possibly most importantly in this phase of the matter, his connections with the police, the fact that he was known to the police and considered by the police to be a man of very good character. He could deal with the police as probably nobody else could on a level which they understood. They said "Fred Hume is all right by us". That is a very important aspect in understanding how it is that Armstrong was able to achieve what he did in this matter. 50 60

At this stage I asked Sergeant Wild: "By the way, you knew Frederick Hume? A. I had never met Hume ... I did not ask Vojinovic". What fantasy are we supposed to be dealing with? Hume is supposed to have engaged criminals to kill someone. The man is coming there telling all he knows and you do not ask him anything about the ringleader, the man who is providing the money. It turns out later that he did know, but that is another matter. "What did you do on that Sunday night to investigate these serious charges ... A. I was busily engaged that week investigating another shooting affray". 10

TAYLOR, A-J.A.: It is basic to the whole of this attack, is it not, that Exhibit 29 in fact existed, that there was a record of interview, that it was taken by the police and subsequently destroyed.

MR. GRUZMAN: That is not basic. It is one aspect.

TAYLOR, A-J.A.: Supposing we come to the same conclusion about this as his Honour Street, J. did, that there never was a record of interview. How could you mount this attack? That means the whole of the attack has gone. 20

MR. GRUZMAN: No.

TAYLOR, A-J.A.: If they never in fact interviewed Hume.

MR. GRUZMAN: There are two points to this. One is the framing of Vojinovic.

TAYLOR, A-J.A.: You mean in Victoria. That is another matter. 30

MR. GRUZMAN: That is not another matter.

TAYLOR, A-J.A.: You still attack the police on the basis they framed Vojinovic?

MR. GRUZMAN: Yes.

TAYLOR, A-J.A.: How can you mount this attack on the police unless you are satisfied that there was a record of interview and the police destroyed it.

MR. GRUZMAN: That is putting the cart before the horse.

TAYLOR, A-J.A.: I understood the whole of what you are putting to be based on the initial premise that he did interview Hume and then got a record of interview and then for reasons that you elaborated with vehemence and at length, they decided that the record of interview would be torn up, and that is what got them into these difficulties and they told lies. Supposing there never was a record of interview of Hume taken by the police. 40

MR. GRUZMAN: With respect I do not take that assumption.

TAYLOR, A-J.A.: According to you in this re-hearing we have to find that there was a record of interview taken from Hume and that the police destroyed it.

MR. GRUZMAN: We ask your Honours to find it.

TAYLOR, A-J.A.: Supposing we come to the opposite conclusion, and there never was a record of interview with Hume, do I have to concern myself with all this analysis you are making? It is simply that the police did not do what they ought to have done. 10

MR. GRUZMAN: That is right. But you cannot do it that way.

TAYLOR, A-J.A.: I am not asking you to agree that I should find that there was no record of interview. All I want to know is, is it correct that if in fact there is no record of interview with Hume and therefore no destruction of police evidence, then the whole of this attack on the police force, leaving aside Vojinovic, disappears. 20

MR. GRUZMAN: No.

TAYLOR, A-J.A.: If there was not a record of interview and they did not destroy any evidence, what have they done wrong?

MR. GRUZMAN: I think I could agree with your Honour if it was put a different way. As your Honour is putting it to me I understand your Honour is saying if there is no roof on a building -

TAYLOR, A-J.A.: Let us talk about the facts. If there is no record of interview. 30

MR. GRUZMAN: With respect, our submission is that is no way to approach it.

TAYLOR, A-J.A.: There is a finding of the learned trial Judge that he is not satisfied there ever was a record of interview.

MR. GRUZMAN: That is one of the reasons why we are here.

TAYLOR, A-J.A.: I suppose it is faintly possible that one could come to the same conclusion.

MR. GRUZMAN: It is possible. 40

TAYLOR, A-J.A.: If I do come to that conclusion I understand you say I need not be concerned about the rest of the allegations against the police.

MR. GRUZMAN: No your Honour, with respect.

TAYLOR, A-J.A.: How could I be concerned on the basis that there was no record of interview.

MR. GRUZMAN: That is putting it the wrong way round.

TAYLOR, A-J.A.: You won't accept that there could not be no record of interview.

MR. GRUZMAN: It is in your Honour's hands. In the end each of your Honours will say there was or was not a record of interview.

TAYLOR, A-J.A.: If we say there was not a record of interview, the whole of this must go.

MR. GRUZMAN: No.

TAYLOR, A-J.A.: What is left. 10

MR. GRUZMAN: After you have considered my submissions, then you may come to the conclusion.

TAYLOR, A-J.A.: I am well aware that we have to consider your submissions. Am I not right in saying that if there was no record of interview and no suppressing of evidence by the police, the whole of this elaborate attack on the police, except Vojinovic's false arrest which is another matter, disappears. It does not call for an answer. 20

MR. GRUZMAN: In our view it does.

TAYLOR, A-J.A.: Because there was a record of interview.

MR. GRUZMAN: It does in every way.

I think we are all taking your Honour, Taylor, J. the wrong way. Did I understand your Honour to be putting to me that assuming after your Honour has heard all the submissions, ultimately you come to a conclusion that Exhibit 29 did not exist? 30

TAYLOR, A-J.A.: There never was a record of interview. Exhibit 29 did exist.

MR. GRUZMAN: There never was a record of interview?

TAYLOR, A-J.A.: Yes.

MR. GRUZMAN: Then your Honour wants me to answer, is it necessary to make any findings on these matters?

TAYLOR, A-J.A.: That is one way of putting it.

MR. GRUZMAN: Our answer to it is, yes, because this is not an ultimate Court. If there are questions which require a finding of fact, then your Honour should make it. 40

TAYLOR, A-J.A.: You mean I should give a decision on the basis there was a record of interview.

MR. GRUZMAN: At the moment I am making one submission.

Let me make my submissions one by one. I invite your Honours to find that Sergeant Wild was not a truthful witness. There has been no finding on that as yet. Secondly, we ask your Honours to find constable Follington was not a truthful witness. Our submission is that your Honours should make those findings even though ultimately you say "We are still not satisfied that the record of interview existed". These are relevant facts which arise on the evidence. If the matter had ultimately to be considered in any other Court, then those are findings which this Court should make. 10

TAYLOR, A-J.A.: When you get to the other Court, whose findings on credibility are you going to put forward, the trial Judge's or ours, or are you going to ask them to make findings?

MR. GRUZMAN: With respect to Wild and Follington His Honour the trial Judge never made a finding.

TAYLOR, A-J.A.: He said he accepted their evidence. 20

MR. GRUZMAN: That is not a matter of credibility.

MASON, J.A.: Are we going to receive a document from you that in connection with this branch of your case sets out accurately and with precision the findings of fact that you are asking this Court to make either by way of substitution for findings of fact made by the learned trial Judge or in addition?

MR. GRUZMAN: We shall.

MASON, J.A.: Are you also proposing to furnish us with a like document in relation to other branches of the case on the facts? At the moment all we have is a document indicating the findings you are attacking. We do not have a document - 30

MR. GRUZMAN: - asking for positive findings.

MASON, J.A.: Exactly.

MR. GRUZMAN: We shall photostat one. I am told it might take some little time, a day or two.

MASON, J.A.: It would be of assistance if such a document were handed to the Court at the outset at any branch of the case on the facts that you are proposing to argue so that the Court knows immediately when you come to that branch of the case what it is you are contending for. 40

MR. GRUZMAN: I appreciate that.

MASON, J.A.: At the moment time is being taken up in interchanges between you and my brother Taylor because it is not clear and is not known precisely what you ask.

MR. GRUZMAN: I appreciate that. We will certainly comply with your Honour's request. I did think at this stage it was not unclear. What I was doing at this stage was attacking the credit of Wild and Follington.

MASON, J.A.: I follow that.

JACOBS, J.A.: I thought we asked for some such document the other day and were then told it would take a little while to prepare.

MR. GRUZMAN: I think your Honour the Presiding Judge may be correct. 10

Page 740 line 27: "When did Follington first tell you he knew Hume? A. He told me on the Sunday night". Right from the beginning and Wild knew who they were dealing with in Hume. "I thought you told us before that you knew nothing of Hume ... Hume has assisted the police on a number of occasions". At page 742: "I suppose the fact that Hume had assisted the police had some effect on you? A. Yes ... No effect on your investigation? A. No, I questioned Hume very thoroughly". We have Wild saying that he followed normal police investigation by thoroughly questioning Hume, but where he departs from it he says he made no notes. We were not there and we did not see notes being made. The evidence is that the notes did exist. If the notes had existed it would have been in accordance with proper police procedure and with the methods of this detective. Your Honours are asked to believe in this particular case for some unknown reason all the tenets of police investigation were thrown aside in this particular respect that he was questioned very thoroughly but not a word was put in writing. 20 30

Just suppose for a moment that Mr. Barton is telling the truth. Let us suppose he went down there on the Wednesday and there is Hume's statement. Suppose it disappeared. How on earth would you prove it? How could you possibly prove it? The only way would be by showing that every probability pointed to its existence and the only thing missing is the document. Is not this exactly what Sergeant Wild is saying. "I questioned him very thoroughly, but I made no notes about it". Inspector Lendrum said it was inadvisable. He would have made notes. Every fact in this case points to the existence of this document. We would submit this Court is not so naive that it would not admit of the possibility that what we are contending for could happen. In our submission it would not admit of that possibility in any case. It certainly would not deny that possibility where the sworn evidence in this case is that Mr. Armstrong said that is what he could do. 40 50

"I said if you are examining a man suspected of being involved in a conspiracy to murder, would not you regard it as your duty to make careful

notes of what he said?" He cannot answer the question. His answer was "I did not in this case". "It is a hypothetical question. If you are interviewing somebody suspected of being involved in a conspiracy to murder ... on the statement of Vojinovic you had reason to suspect Hume? A. I had reason, yes ... you regarded Hume as a man of good character".

So far I venture to suggest Wild has not given an honest answer. There may be some exceptions. In substance I do not think he has given one series of answers which your Honours would accept as being true. Every answer, every series of answers, is so improbable, so contrary either to his own statement or to common experience, that no one could possibly accept them. I am not attacking Sergeant Wild's character on some minor points. I am not applying a lawyer's cross-examination of him and picking him up on some little thing. I am going to the root of the matter. I am examining him on direct issues. I have not raked up anything in his past to cross-examine him on. I am just examining him on the issues in this case. On those he is revealed as a plain, ordinary, outright, untruthful witness. 10 20

Let us look at the fingerprints. I won't read this to your Honours because I read it yesterday. Take the fingerprint incident. Here is a man who goes to check the fingerprints. He cannot find Hume's fingerprints on the file. 30

TAYLOR, A-J.A.: You did go through this yesterday. You did tell us you had a copy brought to the Court.

MR. GRUZMAN: I am commenting on it now. I am only pointing out the series of lies. Why would this man who had so much to lose by lying about all these matters have lied? You only tell lies in Court if the true story is worse than the fact that you are disbelieved. That is about the best you can put it. In other words he gained more by telling lies than by admitting the truth. Since it is a very serious matter for a man like him to be telling lies, your Honours would assume that the truth which he was trying to conceal was a very serious matter. 40

I am reminded by Mr. Purvis of the note taking with Hume when he made his own affidavit in February 1968, when he had every time to think it over carefully considering the matter in the privacy presumably of his own office and under no pressure. This appears at page 2391. He says "I went to the C.I.B. headquarters and gave Detective Sergeant Wild a statement and he took some notes". Wild says he did not. 50

Take the affidavit of Hume that I have just referred to. That was obviously a document that could have been of some importance. We got to know

about the document by accident. This appears somewhere in the evidence. A copy of it was in Hume's cash book when it was produced. We kept quiet about it and we subpoenaed the police department to produce it amongst other documents. Sergeant Anderson had been recruited by the Commissioner to answer these subpoenas about which there had been a lot of trouble. Eventually his Honour ordered the police to pay costs on one of the motions to set aside our subpoenas. It was like drawing a tooth. Eventually in respect of this matter Mr. Forbes of the Crown Solicitor's Office appeared. 10

TAYLOR, A-J.A.: He appeared because Anderson had said he did not produce it under instructions.

MR. GRUZMAN: Let me take it in order. Mr. Forbes had earlier appeared to set aside the subpoena. That had been unsuccessful. They had been ordered to pay the costs. Subsequently there was produced to the Court what were alleged to be all the documents relating to this matter in the possession of the police. The subpoena covered this particular affidavit of Hume. That was not produced. 20
Eventually on cross-examination it turned out that that document had been in Court. Follington had had it in his possession and he claimed that he had been that morning to Mr. Forbes at the Crown Solicitor's Office and had shown him the document and had been advised by Mr. Forbes not to produce it. 30

TAYLOR, A-J.A.: Anderson, was not it?

MR. GRUZMAN: Anderson and Follington. Anderson was giving the evidence. Follington had the document and was there. The document was in fact handed to Follington that morning before they came to Court. Then his Honour indicated he would hear Mr. Forbes, and Mr. Forbes actually came to the Court.

TAYLOR, A-J.A.: Anderson gave evidence and said he did not produce the document because Forbes had told him it was not covered by the subpoena. 40

MR. GRUZMAN: Exactly. Then Mr. Forbes came into the Court and his statement to the Court was that no such incident had taken place, that he had not been shown the document and he never advised on it.

TAYLOR, A-J.A.: He having been censured by his Honour.

MR. GRUZMAN: But in his absence. When he came to the Court his Honour accepted Mr. Forbes and in so doing I do not know what inference your Honours draw from the fact that there is evidence in the transcript that it was alleged on that morning this document was shown to Mr. Forbes and he advised that it should not be produced and that is why it was not produced. 50

Here is another instance where it was only the fortuitous change that a copy of that affidavit was in Hume's cash book when it was produced to the Court and handed out to us for inspection by his Honour that we learned about it. What chance did Mr. Barton have of getting Hume's affidavit from the police if they took all those steps to prevent it. It is a pretty fair indication.

TAYLOR, A-J.A.: Who took the steps to prevent it?

MR. GRUZMAN: I can only go on the evidence. 10
Anderson says that he showed it to Mr. Forbes and Mr. Forbes had advised that it should not be produced and it was handed back to Follington. Mr. Forbes denied it.

TAYLOR, A-J.A.: That makes Anderson the villain, if you accept Forbes.

MR. GRUZMAN: The fact is we knew about the document, the fact is we subpoenaed it in the usual way. The fact is we never got it.

JACOBS, J.A.: When you say "in the usual way" 20
you mean in general terms.

MR. GRUZMAN: In terms which covered this document. His Honour was in no doubt about it. I do not think anyone else was. Of course a lie was told. The statement was made on oath that Mr. Forbes was shown this document and that Mr. Forbes specifically advised on this document. Mr. Forbes came to the Court and said "That is not true. Nothing like that occurred".

What chance did Mr. Barton really have of 30
getting documents out of the hands of the police if they would go to that extent about such a document?

(Luncheon adjournment).

MR. GRUZMAN: Each of my learned juniors asked me to inform your Honours that they wish to be associated with me in the allegations that have been made in this Court against Mr. Armstrong in respect of the matters to which his Honour, Taylor, J. referred this morning. 40

I would like to read your Honours a passage from the judgment. At page 1307 of Vol. 4 I was putting to Mr. Armstrong the conversation with Bovill with which your Honours are familiar, the gold pass, police, drugs, and so on. I said to him: "You have already told us that if you told the policeman that if Mr. Bovill ... I have never had evidence destroyed by the police". We are asking your Honours to disbelieve Mr. Armstrong's denial on that matter. 50

I was dealing with Sergeant Wild's evidence. I had dealt with the fingerprint incident. Then I

came to the motor car. The motor car was obviously an important and significant matter in the whole investigation. At page 745: "By the way on the 8th January did you make inquiries from Vojinovic about a motor car that was involved ... prior to interviewing Hume had you any knowledge about the motor car? A. None whatsoever". At page 746, line 31: "In the record of interview Vojinovic alleged in substance that he had been employed ... (over the page) ... I would interview persons to see if I felt that the complaint was genuine ... if the opportunity presented itself, yes". Here we have Sergeant Wild's own admission that his normal procedure would have been to interview on the Monday morning Hume, Momo and Armstrong. His only qualification to that was "If the opportunity presented itself, yes". "I want you to tell his Honour exactly what efforts you made to interview Hume on Monday? A. I did not make any efforts to interview Hume on Monday ... I wanted to find out something about Hume's background... I was engaged on another shooting affray ... on the Monday you had nothing to do". These questions are based on police records. (continues to reading evidence). "He did not know whether England might be called and just what England would say".

Here is an improbable situation again. England is working in the same offices. There is an important and urgent investigation. He knew who Hume was from Follington. Instead of that he says he has to find England and he does not know whether he did or did not. Inspector Lendrum knew Hume. He did not even need Follington to tell him.

"If you had found him you would have had no further reason for not interviewing? A. Only possibly the time ... it is a matter of time and what duties are allocated to you". Again he is basing his alleged failure to interview on the fact that he has not time. "Is this the position, that the reason you did not interview Hume on the Monday was not because you did not have his background but because you did not have the time ... I did not interview Hume until the 18th January". I put those as a series of lies. This man says "I did not interview Hume because I needed his background", and then says "I did not do it because I did not have time", and then says "I don't know which it is". I put such a witness before your Honours as an untruthful witness, unworthy of any credit whatsoever, in other words a deliberate liar.

I asked: "Was Hume hiding from you? A. Not to my knowledge ... it would have been within a couple of days following the 8th". Later on he resiles from that. He realises how ridiculous it is that this respectable man cannot be found in a couple of days from the 10th to the 18th. "Is that the best you can do? A. That is the best I can ... I never interviewed Mr. Armstrong". Here is Wild on the defensive. On behalf of Armstrong and Hume, apparently he is saying in effect "How could I take what Vojinovic said about Armstrong

or Hume even to the extent of asking whether it is true or false". He said Vojinovic had never been spoken to by Mr. Armstrong or by Hume in connection with this matter. "Is this the position, as a member of the police force of this State you would not even interview somebody unless you had evidence that they are guilty? A. That is incorrect ... are not you aware that in this city purely for financial reasons men have been killed? A. It is suspected, yes ... a man in that position is most unlikely to admit his complicity". 10

In the light of the evidence of the difficulties subsequently it turns out that he gets Hume to warn Novak and bring Novak in for interview. He had a lot of hope of getting useful information from Novak.

"It would be your belief that if a man was engaging a killer he would avoid direct contact with the killer ... to remove him as far as possible from direct contact with the killer? A. I would". 20

One becomes innured to hearing killing and murder and contract to kill, and one tends to shrug them off. You hear the same thing repeated time and time again and it does not seem real, but it is real. Who would believe in a civil action to set aside a contract that you would have evidence from the senior police officer investigating, that the very thing that we allege happened is the normal thing that would happen, that is that a number of intermediaries would be engaged to form a chain to bring about the killing of a person. There is the evidence. One aspect of this matter which is regular and proper is the regularity and propriety of the methods by which the contract to kill was brought about. It was in accordance with normal experience. There was nothing unusual about that. 30

He said: "It seemed rather foolish to me that a man would engage another man to kill, who in turn engaged a third person, who in turn engaged a fourth person ... there is no written record". Your Honours cannot believe that Sergeant Wild conducted this investigation in this way. 40

We got the fingerprint man at Court and eventually got the fingerprints. At page 761 line 21: "You have had 28 years experience in the force ... (reads to page 762) ... he accompanied us to the C.I.B." Two cars at spaced intervals so as not to attract attention. All the paraphernalia of a police raid, and then he denies he was arrested. While he is being interviewed some other people are searching Vojinovic's premises. Every paraphernalia of a proper full police investigation is carried out. At the bottom of page 762: "Do you tell the Court you did not have time to interview the persons involved ... it is in your diary that you record your movements". His Honour Street, J. said that one of the things he took into account 50

in finding against the record of interview was that it would have been difficult to alter the police diaries. Page 764: "This diary records the whole of your movements for Monday 9th January ... I certainly have not recorded all the telephone calls and every person I saw at the C.I.B." The fact that there is no entry of a particular interview in the diary by no means proves that it did not take place.

At the bottom of the page: "Monday the 9th, on duty C.I.B. at 8 a.m. ... then at office re safe squad inquiries and awaiting call from informant until 11 a.m." 10

We put that Vojinovic had been released for the purpose of giving information to the police to enable Armstrong to be caught. Inspector Lendrum confirmed that. Here we find in Wild's diary for the next morning that he is sitting in his office awaiting a call from informant until 11 a.m. That is Vojinovic. "From 8 to 11 a.m. on Monday morning you came to the office and had a look at some crime reports and then you waited for Vojinovic's call until 11 a.m. ... as soon as Vojinovic rang you went and saw him? A. Yes ... You spent practically the whole of the Monday on the Barton Armstrong matter? A. Only my two interviews with Vojinovic ... (reads on to page 767)". He utterly denied that this was an unimportant matter and nobody was worried about it. Bearing these matters in mind I asked him: "What did you go to Kings Cross for ... (reads to page 768) ... to catch the man who had been shot". In other words everything is pointing not only to normal police investigation but to an extraordinary conscientious and efficient police investigation. Perhaps I do the police force an injustice in that statement. Shall I say normal, proper, but of a high standard. 20 30

At line 8 on the next page he said he rang Brisbane. "In the meantime you were very interested to know what Hume would say? A. Yes ... I could have located Hume, I imagine". 40

At page 778 Wild is asked why he did not record the interview which he says took place. His only answer was "I did not do it." He agrees that a man who has been charged may deny making admissions. "Is not that the reason why police making an investigation have two police if possible ... can you explain what motivated you in having this interview with Hume alone ... here was a difficult complaint". At page 781 line 7: "You arranged for Vojinovic's home to be searched? A. Yes ... this was after the interview concluded". While he is being interviewed the searching is going on. "You regarded this as a pretty serious matter ... There was a discussion with Vojinovic about the suitcase? A. Yes". On the next page I started to press him to get him to admit what was the fact, that Vojinovic had been released in order to get information. 50

Line 13: "It is not exactly the right thing to try and get money from a man by telling him people are trying to kill him? A. No ... He was going to assist the police". It is perfectly obvious that he is assisting the police in the Barton Armstrong matter but this untruthful witness won't admit it. "Vojinovic was released on the basis that he was going to communicate with you? A. Yes ..." Here he is at variance with everyone, with Inspector Lendrum, Mr. Barton, and indeed himself. "You never understood that at all? A. No. Q. Is this what you say, when Vojinovic left the C.I.B. on the Sunday night as far as you were concerned that was the end of it ... I see many criminals". He has to explain this meeting. How does he explain it? "Did not you think in the case of the criminal who was trying to get money ... Vojinovic was to be released on the basis that he would assist the police? A. No ... I did not refer to him as an informant in that respect". He says he never came voluntarily. "When you say in your notebook 'Waiting for phone call from informant' ... and then went to the city to see informant? A. That is the usual thing".

At page 788: "Vojinovic left the C.I.B. on the Sunday night on the basis he would do all in his power to assist the police in his investigations in the Barton Armstrong matter ... (reads to page 789) ... I do not know what Vojinovic would be ringing me about the next day". That is a lot of rubbish. When he did ring he immediately goes out to see him. He sat waiting for him to ring, he does not know about what, and when he is phoned he immediately goes to see him. It just does not make sense. At page 790, line 37: "This is the position, is it not, this man rang you up ... I wanted to find out what was in Vojinovic's mind". Enough has been said here to show very hard lying is going on on the part of Wild. He is completely and utterly trapped. Page 792, line 21: "I suggest to you some such conversation took place that he was offering information and assistance for money ... he never offered to do anything further".

Line 20 on page 793: "Did you still maintain as at Monday morning at 11 o'clock there was nothing Vojinovic could do to assist the police in their investigations ... I did not think he could assist". The next afternoon he runs out to see him again. The next morning he chases round Kings Cross looking for him. It is an obvious lie. (Continues reading evidence from pages 793 and 794). "... You had no expectation of seeing him". In the morning he sees him, and he goes off forever, and in the afternoon he sees him, and he goes off for ever. (Continues reading evidence of Sergeant Wild). "Had I seen Vojinovic I would have spoken with him". He has in his book that he was looking for Vojinovic.

MR. GRUZMAN: "Are you relying ... it is not a lie". It is just fantasy. Words cannot describe the web in which this policeman has got himself. There

cannot be any truth in it whatsoever and there is no doubt that lies are being told. We only ask your Honours to say "Why is he doing it? What is the reason? Why is a man of 28 years experience acting in this way? That is the question. I put to him, "You wanted to see Vojinovic, did you not, because Vojinovic had been assisting the police ... I could not think of another way".

There is a fair test of the situation.. What you have got here is an assumption that every word Barton said and every word that Vojinovic said was the gospel truth. So here in Sydney there was a conspiracy by Mr. Armstrong to murder Barton. That is the submission we make. 10

Here you have evidence of a senior police officer - the senior police officer who dealt with the matter which is properly before him and I asked him, "How could you prove it?" and he said, "There is no way". He asked Hume, and asked Momo, and that is the end of it. That means nobody is safe in their home, it means if anybody wants to conspire to murder that is just it; they just do it and the police are at a complete loss to prove it. 20

When you have an officer speaking like this - and again I say this man is no fool, he is a top man - this is not the true Wild talking, this is the Wild in difficulties. I say to him "You did not even interview Hume for a week afterwards ..." that was another untrue answer because he knew that Hume was known to the police and was a friend of England. I asked him the next question: "You knew that ... A. I cannot answer that in its entirety". That is rubbish. Then at line 15: "You have already told us that you believed that ... as soon as possible after the complaint was made". He interviewed him on the 18th. "I put to you that on the Wednesday you saw Vojinovic and gave him \$300? A. That is not correct ... at the Central Court". On what possible conceivable basis would Vojinovic want to see Wild about a matter that had nothing to do with Wild? Because Wild is forced into these lies - every one of them he is forced into. There is a record in his diary, so in regard to anyone of these matters he must give your Honours some explanation and this is his explanation for this one: "He wanted to see me regarding his forthcoming appearance at the Central Court ... to him". Here you had, at all events, a deal being made as to which we know the evidence is that Wild put \$100 in his pocket, and of course he would not want any witnesses. So far as the \$400 was concerned, he said he paid it to Vojinovic and nobody would believe Vojinovic against him. It so happened that it suited him better to say there was no money involved, again on the basis that his word would be taken. He did not ask Follington to go with him, he did not think it was necessary - "Q. On the Monday you saw him twice ... premises at Randwick". I think I have read to your Honours 30 40 50 60

what he said about the conversation - "It could be adjourned. That is a matter for the officer in charge", etc. It ended up that he did not know, it was a matter for the Courts and neither of them knew. Both of them had little conversation. Here we have the experienced sergeant and an experienced criminal talking about what a Court would do in a typical case. "Weren't you fed up ... I never gave him \$300".

Then I put to him, "The best part of that ... by the police to Brisbane". 10

I just want to interrupt myself there for the moment because in some respects there is still the disadvantage of Follington's evidence. I put to him that something happened on the Wednesday or thereabouts which stopped his investigation, and I asked "Did your interest continue unabated? A. Yes". Here is the senior detective sergeant swearing that as from Wednesday nothing happened and his interest continued unabated. 20

Then Follington, on the other hand, and I will come to it in detail later, said that as at Wednesday he formed the view that there was no substance in the allegations and he formed that view as the result of "what Sergeant Wild ... he could see no substance, no".

So you had the two police entirely at variance: Wild swearing that nothing happened on the Wednesday to make him lose interest in the matter, and Follington, on the other hand, saying that Wild told him as at Wednesday that there was nothing in it. 30

There is another matter where you have got the two police completely in conflict about this vital matter, the contacting of Hume. It is an important matter - Exhibit 29. "I would like to get an answer to that question ... during that first week, yes". That must have been a lie because he himself had said, and as I have already earlier pointed out to your Honours that attempts were being made to contact Hume within a day or two after the Monday and here he is saying, point blank, no question of mistake or misunderstanding, " ... that there should be no attempt to locate Hume during that first week ... A. No." 40

Follington's evidence, of course, is the exact opposite. Follington said at page 802: "When did he tell you to contact Hume ... on the night of the 8th, to the best of my recollection". There are the two police, one of them - and in this case it appears to be Sergeant Wild because he said that he wanted Hume found within a day or two after the Monday - so his first evidence accords with Follington's, but later on he realised what an impossible situation he has got himself into because if they were looking for him how could they possibly not find him for ten days? It will 50

be found when examining these two witnesses that Wild is a clever liar whereas Folling is a stupid liar. Then I asked him at page 814: "What about Ziric ... no, it did not".

I might say this, we were able to nail this particular lie because we had a document, one of the documents produced by the Police Department contained a statement by Follington that on this Tuesday he was looking for Hume and Ziric. So we knew that Wild was telling a lie. We were able to prove that but we could not prove it out of his mouth. He was such a clever liar that even though he had said it before he was able to resist cross-examination and I never at all succeeded in making Sergeant Wild admit something we knew to be wrong because we had the document signed by Darlington. 10

JACOBS, J.A.: You could not make Sergeant Wild do what?

MR. GRUZMAN: Admit what he was saying was untrue. We knew it was untrue because we had a document signed by Follington which could not be used to cross-examine Wild. It was just a matter of whether on an intellectual basis one could persuade Wild to say what was the fact and, indeed, he had said it in his evidence in chief. But he was sufficiently skilful to be able to parry the cross-examination and not make the admission. He actually made it himself earlier, and Follington makes that clear later on. 20 30

If a man is like that, what chance does one have of making him admit the facts? For example, I put to him that something happened to him on the Wednesday to make him change his attitude. We did not have written instructions from Mr. Armstrong or anything like that, all we got was objectively from the facts of what happened, but it is not the sort of thing you are going to get evidence on. That is where the thought comes in, one draws inferences from the objective facts which are proven. 40

That is where we come to the Mengler matter. Just to repeat the significance of it, if what we are asking your Honours to believe is true, that this Vojinovic was giving a truthful version - then you would expect that extraordinary measures would be taken to get rid of him. Something awful, you would expect, would happen to Vojinovic. He might get shot, he might be given a concrete jacket and dropped in the river, something you would expect to happen to Vojinovic that was awful. And here we are in a civil context, and I have been reminded by one of my learned juniors that in response to something your Honour Mr. Justice Taylor said this morning - we feel sure that your Honour said - we may be wrong - that we had to prove beyond reasonable doubt that Armstrong was responsible for the police inactivity or reversal and I am told that I said I accepted that, amongst other things. Of course I 50

do not. The onus is the civil onus, the content of the proof varies according to the seriousness of the charge, but the onus, of course, is the civil onus - as we apprehend the case.

I was saying that you would expect something awful to happen to Vojinovic. Here we are, in a civil case, adumbrating that something would happen and, lo and behold, we can prove that something awful happened. The submission is that he was immediately after, or very soon after, they found out what had happened - we think that on looking at the whole of the evidence and drawing the best inference we can that it was perhaps on the Wednesday night or on the Thursday - he goes to Melbourne with Momo. Of course if something awful happened to him, that could only mean that information must have come to Hume and Novak that he had given information to the police. If you look at his evidence, he was arrested on the 17th and he said in his evidence that they had been in Melbourne for some days and had subsequently gone to Ballarat to do this job or to lay the ground for doing the job. So, on working back, it appears that he must have left Sydney either on the Wednesday evening (because he saw Wild in the morning), or, at the latest, on the Thursday. That is a pretty solid chunk of proof that Hume and Novak knew by the Wednesday that Vojinovic had been to the police. 10 20

The fact of the occurrence itself indicates that the information went to Hume and Novak on about Wednesday, at least some time prior to the Wednesday or Thursday when they departed for Melbourne, because preparations would have to be made. So the odds are that Hume and Novak knew about Vojinovic probably on the Monday if not on the Sunday night. That gives a lot of credence to the probable existence of and the interview having taken place on the Monday or Tuesday. I put it as a chunk of fact which weighs heavily in favour of that submission. 30 40

We will put some submissions later as to exactly why probably Vojinovic had to disappear. One obvious thing is retribution. Another matter - and perhaps your Honours might consider it now - is this: assuming that as about the Wednesday Armstrong, either through Hume, determined that this investigation must end, one of the problems was the statement which existed. Let us assume for a moment that Wild was approached to destroy the statement. He would be in some difficulties at this point. First of all he would not know what would happen and what would develop. He had seen Vojinovic as late as Wednesday morning so Vojinovic was still happily running around Sydney and was due a few days later to appear at Paddington Police Court and was quite likely - being the sort of fellow he was - to tell everything in Court. At the same time there was still this commercial negotiation going on between Barton and Armstrong and nobody could know at that point of time whether they could result in an 50 60

agreement or not. So there were at least two very substantial causes of worry that this might have suddenly blossomed over them as at, say, Wednesday: the possibility of Vojinovic spilling the beans in Court in a few days time in order to gain some advantage and the other was the possibility of the Barton and Armstrong matter blowing up so that you could expect trouble in that field.

So Wild, before destroying this document, or passing it over - whatever he did with it - would want to be satisfied of two things: (1) Vojinovic was out of the road and (2) the Barton and Armstrong transaction was over. 10

I will deal with the Vojinovic matter first. Then you will find that, lo and behold, on the 18th Hollington trips up, for some unknown reason, to see Mr. Barton and asks him "How did the deal go?". That is all the conversation. That is all he wants to know - has it been concluded - and he trots back again. 20

Dealing with the Vojinovic matter; of course there are various ways of disposing of someone and I suppose that to put a fellow in gaol in another State is pretty effective. In this matter we are asking your Honours to find that Vojinovic was framed. The law is that when such a matter as this arises in civil proceedings, the conviction is irrelevant. So your Honours are entitled to consider the evidence which is before this Court. Does your Honour desire me to refer to any authority on that? 30

JACOBS, J.A.: Hollington's case?

MR. GRUZMAN: Yes. So the matter is touching on the evidence and for this Court to consider it. What is the evidence? Vojinovic has sworn in these proceedings that he had permission from Novak to use this motor car. So there is uncontradicted evidence before this Court that Vojinovic was in fact not guilty. At page 406, line 21, in re-examination it was put to Vojinovic: "You were asked a number of questions by Mr. Staff --- Michael Novak". So that the uncontradicted evidence before your Honours is that Vojinovic was wrongfully convicted in Melbourne. 40

There is other evidence that he was wrongfully convicted on the evidence of Novak and there is evidence that Novak was available to the defendants if they wished to call him to counter that suggestion but they did not seek to ask him any question on it. 50

At page 409, line 21, after his Honour's direction to me to ask a leading question I asked, "Did Michael Novak tell the Court that you had permission to use the car ... A. On oath". Unless any doubt is case on that I do not propose to take it any further but Vojinovic in fact gave evidence of

all the surrounding circumstances, the details of going to Melbourne with Novak and what happened and so forth.

I do not have to trouble your Honours with that detail because he simply swears that he had that permission and gave that evidence in Court and that Novak swore something which, according to him, was a lie and he was convicted. That is the evidence in these proceedings, but before your Honours the only evidence is that he in fact had permission. So there is no question that in these proceedings other than Vojinovic was wrongly convicted. 10

The inference to be drawn from that as to why Vojinovic is framed is a matter that falls into various categories but one of the matters I wish to deal with at this point of time is the connection of Wild with this matter.

I was going to deal with the frame-up of Vojinovic in the context of Wild. I have already told your Honours yesterday what we did, because the rules of evidence sometimes make it hard to prove facts. For example, this was a matter which went on this aspect to Wild's credit. So you could not just call Mengler to prove that he had said something to Wild and Wild said something to him but were bound by Wild's answers. So of course it was not an easy matter to prove. I told your Honours what we did, as appears in the evidence, we subpoenaed Mengler from Victoria and had him here at the Court so that Wild could see him and by those means we managed to keep Wild, to a certain extent, anyway, on the straight and narrow path and get some of the truth of this matter out of him. 20 30

Starting at page 1803, line 33: "Subsequently you learned that he had been arrested in Melbourne ... in connection with such an allegation". The inference we are going to ask your Honours to draw from this was that Mengler was a completely honest, straightforward and reliable policeman who had received from Vojinovic what he regarded, naturally, as a cock-and-bull story. Mengler, if he had not been a decent, honest policeman, would not have taken those steps on Vojinovic's behalf. But having received from Vojinovic what he naturally thought, as he said, was a cock-and-bull story about threats to kill and so on as an explanation of why Novak would obviously tell lies about him, he took the course of writing to the policeman whose name he must have got from Vojinovic, who, it was said, could confirm it. I put to him "Did not Detective Mengler in that letter ask you to confirm or deny that Vojinovic had made to you these allegations ... against certain people, including Momo?" That was the real point, of course; that Momo, who was giving evidence against him, "Did he have grounds for having a grudge against Vojinovic?". He said "Including Momo? ... a man named Barton". What Mengler was looking for was confirmation that he could not believe Novak, as Vojinovic was saying to 40 50

him, "Don't believe this man. I am innocent. This man is telling lies against me because I told the police that he was party to a conspiracy to murder. He is out to get me". Then Mengler writes to Wild for confirmation of the matter.

TAYLOR, A-J.A.: The only evidence of that is in Wild's evidence?

MR. GRUZMAN: Yes.

TAYLOR, A-J.A.: The letter was never produced?

MR. GRUZMAN: No, it was destroyed by Wild. 10

JACOBS, J.A.: You had Detective Mengler there. You had given him a subpoena. He knew the contents of the letter that he had written.

MR. GRUZMAN: The trouble was that under the rules of evidence you could not prove it.

JACOBS, J.A.: What rules?

MR. GRUZMAN: I was cross-examining. As your Honours will see at the top of the page: "Mr. Gruzman stated ... credit". A certain answer was struck out. So I am restricted to credit. As a matter of credit I can only cross-examine him in that regard and I am bound by the answer. 20

TAYLOR, A-J.A.: I understand you finally got out from Wild that the letter had asked about what Vojinovic had said, about threatening to kill, and the question was: "Did you tell Detective Mengler ... kill a man named Barton". The whole point that you were putting was that this would show the reason for Momo framing Vojinovic?

MR. GRUZMAN: Yes. 30

TAYLOR, A-J.A.: But Vojinovic had not said anything about Momo being involved, according to this letter.

MR. GRUZMAN: That is what I am putting. The question was: "Did you tell Mengler that Momo had a motive for framing him?".

TAYLOR, A-J.A. He said "No, I did not". Do you say that answer is false?

MR. GRUZMAN: No. I say it is true. If your Honour does not follow me it is my fault entirely. What I am trying to explain to your Honours is this - 40

JACOBS, J.A.: Does this summarise it: you say the duty of Detective Sergeant Wild was clearly to inform the Victorian detective that whether this story of Vojinovic was true or not there had occurred events in New South Wales which could be regarded as supporting it?

MR. GRUZMAN: Precisely.

JACOBS, J.A.: And you say he did not give that information?

MR. GRUZMAN: Precisely.

JACOBS, J.A.: What information did he not give?

MR. GRUZMAN: He did not give information to show that Novak had a motive for framing him, and in the passage which his Honour Mr. Justice Taylor just read out he was asked "Did you tell Mengler ... in including Momo?" he sounded surprised. "Including Momo? No." He never did tell Mengler he said in this passage, that the allegations involved Momo. 10

JACOBS, J.A.: He did tell him that the allegations involved - -

MR. GRUZMAN: - - Barton. That is all he said.

TAYLOR, A-J.A.: That depends entirely on the inquiry - -

MR. GRUZMAN: That is a different matter to what his Honour is putting. 20

TAYLOR, A-J.A.: Let us depart from that, if you are so rude as to interrupt me, Mr. Gruzman, and get on to something else. If that is the evidence on which you are showing us that Wild - -

MR. GRUZMAN: That is what happens each time I try to develop a point. I say, with great respect, that your Honour Mr. Justice Taylor won't let me finish.

TAYLOR, A-J.A.: I do not follow it. 30

MR. GRUZMAN: As I say, if your Honour does not follow my submission, it is my fault entirely because it is my job to make clear to your Honour my submission, and if I am not doing that I am sorry.

MASON, J.A.: I thought you told us this morning, Mr. Gruzman, that you were not prepared to rely on any material that was in the evidence of Detective Sergeant Wild.

MR. GRUZMAN: I did say that, your Honour.

MASON, J.A.: Did you mean that? 40

MR. GRUZMAN: I indicated that in reference to a particular matter, and I opened this part of the address by saying that, having Mengler there, we had kept Wild more or less - as I put it - on the straight and narrow.

MASON, J.A.: I realise that, but are you relying on any part of Wild's evidence?

MR. GRUZMAN: Yes.

MASON, J.A.: You are?

MR. GRUZMAN: Yes. I put it to him that Detective Mengler was a detective constable at Hamilton, Victoria (read). Might I say to your Honour, Mr. Justice Mason, what I was particularly saying was that we are not prepared to rely on evidence which was apparently in our favour; - if I did not put this clearly, I should have, - which Wild gave if we believed it was wrong. We told your Honours that we wanted the Court to draw an inference from the evidence but we are not prepared to adopt something which Wild said which appeared to be in our favour and was wrong. I agree, now that your Honour has reminded me, that I put it somewhat more broadly than that. 10

MASON, J.A.: You did. You put it very dogmatically this morning.

MR. GRUZMAN: I did, your Honour, but I was wrong because the real submission I am making - - 20

MASON, J.A.: The trouble is that once you are using some criterion - "which is apparently in our favour but which we believe is wrong" - is not very helpful to the Court because as the Court goes through the transcript of evidence we have to rely all the time on what you say as to your belief or your client's belief.

MR. GRUZMAN: May I ask rhetorically, does not that always happen? This Court, when dealing with a matter, will subsequently go through any evidence and say "This part of the evidence we accept and this part of the evidence we reject". Even Mr. Armstrong's evidence, his Honour, Mr. Justice Street, does not wholly reject. Even a man who is an incorrigible liar can tell the truth in parts and the same applies, I suppose, to Mr. Wild. But one thing we will not do is to rely on something, whoever says it, which in our submission, is opposed - - 30

MASON, J.A.: You have cleared that up. The somewhat dogmatic statement you made this morning lingered in my mind and I was surprised when you returned to it. 40

MR. GRUZMAN: I may say, with respect, that is right, your Honour.

At page 805, line 10, "He arrested the man ... which was not his own? A. That is right ...". What type of man was Vojinovic - I would ask your Honours to note that passage. "and he told you ... I do not think so, no". Is that the attitude of a fair, decent and honest policeman? Certainly not. 50

TAYLOR, A-J.A.: You are not asking us, you are telling us. But you do not have to worry about it, you have made your submission. This all depends on the existence of and the destruction of the record of interview?

MR. GRUZMAN: Nothing to do with it, your Honour.
I will come to that later.

TAYLOR, A-J.A.: What would be the point of all
this?

MR. GRUZMAN: What would be the point of this if
there were no record of interview?

TAYLOR, A-J.A.: Yes.

MR. GRUZMAN: May I answer your Honour on that?
Because that was part of the scheme to get rid of
Vojinovic. 10

TAYLOR, A-J.A.: Why did they want to get rid
of Vojinovic if there was no record of interview?
He had not done anything wrong.

MR. GRUZMAN: It was not only the record of interview.
These police were fixed with Vojinovic's statement,
which was that there had been a serious crime
committed, and an even more serious one proposed,
and with Vojinovic running around and possibly
available in due course to give information direct
to Barton there was every chance of a deep and wide
investigation. So it suited everybody - Armstrong,
Hume, Novak and Wild - to have Vojinovic out of
the road. That effectually put a stop to any
further investigation. 20

TAYLOR, A-J.A.: What you are saying is that -
whether on any construction of the evidence or
not - there was an arrangement, agreement or course
of action by the police to suppress other evidence
in the case - Vojinovic?

MR. GRUZMAN: Yes, I am not suggesting that as part
of the original scheme, I can only suggest from
what appears in the evidence, to get rid of
Vojinovic involved Wild. I do not know about that.
But what is clear is that it happened, that
Vojinovic might escape, cause a complication to
Wild, and Wild made sure that he didn't. As a
matter of fact there is evidence to suggest that
Wild may have been more deeply involved in the
Vojinovic scheme. For instance, no effort was ever
made to bring him back to this State and he never
came back to this State until we brought him here. 30 40

TAYLOR, A-J.A.: What was the date that he had
to answer that charge?

MR. GRUZMAN: The 16th.

TAYLOR, A-J.A.: You do not think that he might
have gone to Melbourne because of the charge on
the 16th?

MR. GRUZMAN: Hardly. He went to see Wild about it.

TAYLOR, A-J.A.: He was due to appear at Court on
the 16th. 50

MR. GRUZMAN: If your Honour is saying that he absconded from bail, that is right.

TAYLOR, A-J.A.: Do you think that might have been a reason for his absconding from bail?

MR. GRUZMAN: No. He went there on Hume's business. According to the evidence Novak conveyed him to Melbourne in Hume's car on Hume's business. I know how difficult it is to draw all the facts together at the one time, but these are important and significant matters. It indicates the difficulty that counsel labours under during a hearing for days in trying to invite the Court's attention to them, and of course the Court has its problems.

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If these things can happen in this way, and they involve a close examination of many matters, murders can be committed and conspiracies take place and everybody not be able to physically take them in, but it has never been a problem in the past and I am sure it won't be now.

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Mengler wanted to know from him what type of man Vojinovic was and I put to your Honours again, if I may, that it was Wild's bounden duty as a citizen, as a policeman, a senior police officer, to say "This man Vojinovic might be a rat, he might be anything, but the one thing that is clear is that the man Novak has every motive in the world for telling lies against him, and that is all I can tell you".

He knew about the motive question and then I put to him that he should have said to Mengler - and your Honours can form your Honours' own views about it - that his story might sound like a cock-and-bull story but the fact was that he had made a record of interview and had made these allegations, and whether they were true or false they certainly provided a motive for Momo to tell lies against him, and he said "I did not think of it that way". Do your Honours really believe that statement by Detective Sergeant Wild when he gets a letter from the Victorian Police, because all the facts and the question of motive with Momo is important and he says that he did not think of it that way? He said that he did not - he should have said at the beginning, whether they had been true or false, that the man Momo has a motive to tell lies against him. Of course he did not say it, and deliberately so because Vojinovic was convicted and he deliberately did not do this because it was part of his job in the conspiracy to see that Vojinovic was stifled and part of that stifling was to get rid of Vojinovic.

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(Further hearing adjourned until 10.15 a.m., Thursday, 4th March, 1971).

IN THE SUPREME COURT)
)
OF NEW SOUTH WALES)
)
COURT OF APPEAL)

Term No. 22 of 1969

CORAM: JACOBS, J.A.
MASON, J.A.
TAYLOR, A-J.A.

BARTON v. ARMSTRONG
TENTH DAY, THURSDAY, 4TH MARCH, 1971

MR. GRUZMAN: At this stage I am closely examining the police evidence. Your Honours know I am going to ask your Honours to make a finding that these police are not creditworthy. I was dealing particularly with Detective Mengler from Victoria and the frame-up of Vojinovic and Sergeant Wild's part in it. I was referring to the evidence on page 805. I was reading the passage where I put to him that "his story might sound like cock-and-bull to you but the fact is he has made a record of interview ... I did not think of it that way". We submit that is an untrue answer. I put to him at page 806: "Your intention in writing that to Mengler was to ensure that Mengler did not believe Vojinovic? A. Not to ensure but to give my version of what I thought". Your Honours might ask what do you think is the true position. "You will agree as a police officer that whether what Vojinovic told you about Momo was true or false, Momo would have every reason to get his own back on Vojinovic? A. If he knew of the allegations, yes". On all the evidence I do not think your Honours will be in any doubt as to whether he knew of the allegations at that date. "Mengler wanted confirmation one way or the other whether Momo had a motive for telling lies about Vojinovic". That must have been the position. His answer was "No, that was not my interpretation of it". "Mengler described it as a cock-and-bull story? A. Yes ... the allegation had been made. A. I did not do that, no".

What more evidence would anyone wish to satisfy one that Wild was taking part in the plan to have Vojinovic put away?

"I put to you you knew that if Mengler had known that Momo had a good motive for telling lies, Mengler was the sort of man who would not have proceeded with prosecution ... you never disclosed to Mengler that Momo did have a motive to tell lies ... the matter was coming under appeal? A. Yes".

This is a sorry incident. Here is a perversion of justice, an innocent man serves six months' imprisonment in furtherance of this conspiracy. The officer in charge of the prosecution which caused that shocking result wrote to Sergeant Wild with the obvious intention of finding out whether the informant had a motive to tell lies.

Wild knew that the informant had a motive to tell lies, and never told the officer in charge of the prosecution. It probably is one of the most disgraceful incidents that any Court has had to consider.

When one comes to look at the law relating to these matters generally, public policy and so on, the law recognises the possibility that conspiracies of one kind or another will lead to further acts which are themselves contrary to public policy. 10

This is a matter which has been proven up to the hilt in this Court. There is concrete evidence Vojinovic was innocent. The only evidence before this Court is that Vojinovic was innocent. The defence had available the evidence to prove that Vojinovic was guilty, if it had been so. It has been proved beyond doubt that an innocent man was convicted, and it has also been proved that Sergeant Wild, knowing that that was about to happen or knowing at least of the motive of Momo to tell lies, when asked by the officer in charge did not give the information which would have prevented this perversion of justice. 20

Page 807 line 32: "Did you think you were acting fairly ... his car had been stolen? A. That is correct". This is a car that has been involved in the conspiracy throughout. Hume's car. That was EBD-703. He checked it from his notebook under the date 18th January. He was not convicted until the 24th. "Would not you have expected that Hume would be the one to give the information ... he told me he had given the car to Momo or lent the car to Momo". What an amazing series of events this is. Hume was directly involved in the conspiracy. His car goes to Melbourne with two of the other conspirators, and the conspirator who has given information to the police finds himself put in prison on a false charge. 30

Would anyone have any doubt, knowing the facts of this matter, that Wild would have realised the significance of what was going on the moment it came to his knowledge? Look at the position he was in. He had a statement from Vojinovic in which Vojinovic said there was a murder plot involving Armstrong, Hume, Novak and Vojinovic. He knew it was Vojinovic who had given the information to him. He would have expected something to happen to Vojinovic. Lo and behold he then discovers that Vojinovic is on a charge by Novak of stealing Hume's car. If he did not know anything else, he would have immediately suspected that this was a plot to put Vojinovic out of the way. And he would have done something about it if he was pursuing his duty as a police officer. Instead of that he actively promoted the frame-up of Vojinovic. I put it before your Honours as disgraceful an incident as has ever come to the consideration of a civil Court. 40 50

I won't read again the evidence at pages 808 and 809 relating to the record of interview of Vojinovic which Sergeant Wild says was locked in his locker. I will just read these two questions on page 809 line 25: "You would think the person responsible would deny it ... it would have been in contravention of police rules to have removed it from my locker and given it to anybody".

If your Honours would turn to page 803, and I will read three questions and answers on that page at line 41: "I want to get this clear. I put to you that you became aware that Mr. Armstrong had gone to the C.I.B. ... destroyed the record of interview? A. There was no such document". All we know is that record of interview had to go. The machinery does not matter, whether it was Armstrong directly said it to him or whether Hume said it to him or whether he realised that to effectively stifle the prosecution he did it himself. The point is the record of interview had to be destroyed to prevent the proper prosecution of the complaint that had been made.

"I put it you were a party to having Vojinovic put in gaol for six months? A. I deny that emphatically". Having heard Sergeant Wild I would suggest that nobody could imagine that this man was entitled to have his evidence given any credence in this Court.

We now turn to Constable Follington. I would ask your Honours to look at page 822. At this stage irrespective of the effect on the rest of the case I am asking this Court to examine this evidence and to come to a finding on the credit of these witnesses and then to see whether that fits into the rest of the case. I will only refer on that page to line 40: "Revolver and handcuffs. I unloaded my revolver ... I also took my tie off". This is a matter of major importance in itself. It does not matter one little bit whether Constable Follington locked the glovebox or not. When one is deciding whether one will give credence to a witness it is proper to look at what he does, how he gives his evidence, is it the truth, will he swear lies or will he not. It just happened to come out in his evidence.

In his evidence in chief at page 827 line 20: "Certainly a firearm is what you gathered? A ... I strongly advise you against buying any sort of firearm". Here was a case of the police who had been parties to the buying of a firearm because they regarded Barton's life as then being in danger. Now, having decided to reverse their views, to explain the destruction of the record of interview and their apparent lack of concern about the case, they say, apparently by pre-arrangement between them that Sergeant Wild most strenuously said: "I strongly advise you against buying any sort of firearm". We will see how that squares up with the rest of the evidence. At line 37:

"Did he say something to you ... we have decided to buy a rifle ... I cannot see the necessity under the circumstances". He was party to the buying of it. In the next answer: "Dad has definitely said that he wants to buy a rifle, and I have to do as he tells me. Would you help me to buy one, and I agreed. I then took him to Smith's Sports Store". This is in police time. He goes in Mr. Barton's car up to Smith's Sports Store at the railway and bought the rifle. 10

He has got to explain not only that he was party to the buying of the rifle but also the fact that he took him to the police rifle range to learn how to use it. Yethe says this was all against his advice.

At page 829, line 47: "Did you hear from or see anybody on this day? A. Yes, on that day I was told by Detective Sergeant Wild that he had interviewed Hume ... did you see Mr. Barton?" Your Honours will ask yourselves later why did Follington go to Barton's office at 2 p.m. on the 18th. "Sergeant Wild has interviewed Hume and confirmed the suspicion about Vojinovic ... my business dealings with Mr. Armstrong have gone off all right". 20

On any version of the evidence the juxtaposition and relationship between the signing of this document and the Vojinovic matter is strongly apparent. Assuming that Wild took the statement from Hume on the 9th or 10th, and Barton we know saw it on the 11th, Armstrong finds out that Hume made the statement and wants to get rid of it, get it back or do something. Wild of course is worried what will happen because the matter might develop either because Vojinovic is around and is going to give evidence in Court on the 16th or if the Barton and Armstrong deal does not go through there might be further trouble. He lets it be known to Armstrong or Hume that these matters must be attended to before any arrangement can be made to destroy this evidence. That is why it is probable that Vojinovic is taken to Melbourne and disposed of. That happened on the Wednesday night or the Thursday. Follington goes to see Barton on the 18th to make sure the deal has been completed. When he gets there and finds out it has not been completed he asks Barton to ring him when it has been completed, and informs Wild. 30 40

Follington has to explain another matter. He said he never saw Mr. Barton during the ensuing year until he went to Mr. Bowen's office in November. That is one thing he has got to explain. He explains that in his evidence in chief. At page 832 he says he went over to his home and got there about 2 o'clock. "Barton said 'I am thinking of taking some action against Mr. Armstrong. Have you interviewed Vojinovic yet?'. A. No. As far as I know he is still in Melbourne ... the appointment at Mr. Bowen's office on the 14th November". Then 50

there is a conversation I won't bother your Honours with at this stage.

At page 836 he denies all these arrangements about which Barton had given evidence, as to for example where he had been instructed to press for the name of the detective who was supposed to come along, and tell him he had guests and make it for 7 o'clock. All these complicated arrangements made in the ordinary course of a police matter are denied by Follington. We submit they are obviously true. They would have made the appointment for 7 o'clock because that is a convenient time for them. They would have wanted to get the sergeant's name. They are trying to down-grade the incident to what was practically a casual meeting. 10

At page 838, line 30, he denies that he warned Barton not to let the man get in the car. All these matters are positively denied by Constable Follington.

At page 843 in response to the evidence that he had been allowed to read Vojinovic's statement, which obviously must be true - line 38: "On the morning of the 9th did you see Sergeant Wild give Mr. Barton any document to read ... A. No". Who is going to be believed there - Mr. Barton who has the document or Constable Follington who says he never gave it to him? 20

Page 846, line 40: "Mr. Follington then said he would like to take my son to the police rifle range ... did you tell Mr. Barton you wanted to train his son in the use of a gun? A. No." 30

Then we deal with the record of interview of Hume, which he positively denies. He denies practically all of Mr. Barton's evidence of these events.

Page 858, line 9: "Did you ever tell Mr. Barton in January 1967 or indeed at any time, that he had to be very careful now? A. No ... prepared to spend \$200? A. No". In other words he denies substantially the matters that Mr. Barton had put. "Did you ever say to Mr. Barton the reason Mr. Armstrong blew his top is because the witness from Queensland had told the Court in Victoria something? A. No ... (reads on to page 860) ... did you give a copy to him? A. No". 40

One of the major facts, as I have indicated before in the presentation of this case, is that Mr. Barton had a copy of Vojinovic's statement as a guide to the Court that something at least had taken place. 50

I am not going to take your Honours through page 869, but I will refer to it. This is the evidence I read the other day from line 30 which established without doubt that Mr. Follington told a pack of lies when he swore that Barton was

not in fear of his life. The words which he had written in his report to the superintendent were "Mr. Barton and his family were obviously in fear of their lives". He denied that and said he would say they were concerned, and that was all.

Page 874, line 40: "You said a moment ago you knew from something you had read in the newspaper the question would arise as to whether there was a record of interview with Hume ... some time before 9th February? A. I am not sure of that, but I would say it would be before that". 10

At page 875 I put to him he realised he was investigating a conspiracy to murder, and he agreed. At page 876, line 9 - I ask your Honours to listen to these questions and answers. Obviously each one of them is an untruthful answer, and an important answer to be considered. If a lie is told to the Court and it is an obvious lie, it is a matter proper to be considered by the Court. At page 876 he was trying to say prior to that that he did not think Vojinovic was a dangerous man, just a plain ordinary fellow. I put to him at line 9: "You now know that Vojinovic prior to this occasion had been sentenced to 12 months' imprisonment for carrying a revolver? A. ... I have not checked his record". Can your Honours believe that? He is saying in the witness box under cross-examination 18 months after the events that for the first time in his life he has found out that this man who is said to have been involved in a conspiracy for murder had a conviction for an unlicensed pistol. It is a plain deliberate outright lie intended to deceive the Court. "Are you telling his Honour until I told you in Court you were unaware from any source that Vojinovic was sentenced to 12 months' imprisonment for carrying a pistol ... that is a different set of circumstances". 20 30

People do not tell lies because they want to. To tell the truth is easier than to tell a lie. Follington was not a very clever sort of person as revealed by his evidence. It would have been much easier for him to tell the truth. At each stage this Court has to say not only did he tell a lie but if he did, why did he. Why was he forced, as Wild was, into telling lie after lie after lie? I suppose the other alternative is that he is a compulsive liar and cannot tell the truth. It does not make any difference from our point of view. We are asking your Honours to find that these two police officers are men whose evidence given on oath your Honours cannot accept. He is not a compulsive liar. He is a liar because he is trying to say that the whole incident which occurred was a minor matter. If he had said that he knew the man had carried a gun, it upgrades it. If he said he knew nothing about, it downgrades it. He is trying to downgrade it and say: "Our investigation was fragmentary simply because there was nothing against the man. He was just a pick-pocket 40 50 60

or what-have-you". That is why he is forced to say for the first time in the witness box he found out that the man had carried a gun.

Then he goes on to justify it. He is forced from one absurdity to the next until eventually you have this police officer defending the right for a criminal to carry a gun. I will read it, line 39: "Do you regard a man who has a record for break enter and steal and for carrying an unlicensed pistol as a dangerous criminal? A. No ... I know criminals who have carried pistols merely to give them confidence." 10

JACOBS, J.A.: It is probably true but it is not answering the question you were putting.

MR. GRUZMAN: It gives them even more confidence if they can shoot down a couple of policemen or innocent civilians.

We all know sitting here as members of the community, apart from our respective capacities, that it is a shocking thing that criminals should carry guns. It is something that the law frowns on and society frowns on and particularly the police frown on. Why is Follington forced into a position of saying there is nothing wrong in a criminal carrying a gun, they just do it for psychological reasons. When you find a police officer presenting such absurdities on oath in a Court it is obvious that there is hard lying going on. You could not trust a man who would say that. 20

I put to him: "Are you seriously telling the Court in your opinion a man with a record of break enter and steal and sentenced to 12 months' imprisonment for carrying a pistol is not a dangerous person? A. It depends on the criminal ... I do not consider most criminals dangerous irrespective of their record ... I have not read the record of interview since January 1 ... the complaint was that a man knew of a plot to kill him, not that he was actually going to be involved". Either Follington was so stupid or no reliance could be placed on his evidence on anything, or he was just a plain clumsy awful liar. 30 40

"Was it your understanding of the matter that Mr. Alexander Armstrong, M.L.C., and a Mr. Frederick Hume were conspiring together to murder ..." then I put various matters about the arrangements with two cars. At line 49 I asked him about the cars. I am not going to take up a lot of your Honours' time on this. Each matter has its own little bit of significance. What I was seeking to establish was that the police at first were so concerned that they had a very careful modus operandi for conducting the raid. They were concerned that people were watching the house so that if two cars left together one criminal would tell the other at the Cross. They engaged in a plan to have the two cars leave the house at different times and to go to town by 50

different routes. I am trying to get this out of Follington. Page 879, line 39: "Do you remember the trip into town from Castlecrag ... I spotted Mr. Barton's white Mercedes on two occasions ... this was a pre-arranged plan? A. Not to my knowledge ... the two cars should go by different routes. A. No".

There is a lot of evidence on this subject matter. It is not appropriate that I should take up too much of the Court's time on it. It is a matter of detail. Let it not happen that the significance of the matter is lost because I do not read it all to your Honours. What we put is that the whole plan to catch Vojinovic was a carefully engineered police plan according to proper standard of police work. That is what Barton said. The police when they gave their evidence tried ineffectually to deny that in order to downgrade the incident to explain their apparent absence of work.

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Page 801, line 48: "You knew that at least two men were involved? A. Yes ... Mr. Gruzman likes to differentiate between fear and concern ... I could see no reason for separating any vehicles that left". As against that you have the fact that it happened and you have the admitted fact that cars were parked down lanes and taking his coat off.

I will deal with this little statement about the locked glovebox. Page 883, line 25: "Did the car remain in the lane? A. I do not know how it remained after I left ... your gun was there? A. Locked in the glovebox". He had said this in his evidence in chief. No doubt he has come to the Court to swear this. "Who locked the glovebox? A. I did ... you understood it to be one owned by Mrs. Barton? A. Yes".

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Anyone can make a mistake. When you are dealing with an untruthful witness naturally you expect they are going to tell more lies. Knowing from his evidence in chief that he had given this evidence, we had the car downstairs. I stated: "The car is downstairs immediately outside the Court in Macquarie Street ... you are going to be asked to look at a car outside the Court. It will be suggested to you that is the car you were in that night ... see if you are able to identify the lock on the glovebox that you locked that night ..." Other evidence revealed he is a man who does his own mechanical repairs and is very interested in motor cars, and apparently buys and sells a number of motor cars. "There is no doubt there is no lock on the glovebox you saw? A. Not on this particular glovebox ... Do you think one was put on? A. I do not know, but there was one on it". Here he is utterly caught out. We all make mistakes. The issue of lies goes on. I put to him the first time he told anyone about this lock was in Court, that there was not any police document about it. "If someone was going to change the lock, it must have

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been done today ... DJY-211". From other evidence in the case that is one of the Barton cars. Line 39: "What I put to you is that you are prepared to tell any untruth whatsoever that you think will help your side ...". Barton gave evidence that Follington had gone to Goulburn to make investigations on his behalf. It turned out that Follington was in Goulburn.

Strangely enough I was able to refer Follington to all these different cars and to show from that that he had been visiting Barton throughout the year, which Follington had earlier denied. I put to him he went to Barton's home on four or five occasions and he denied it. The whole of his evidence is lie upon lie upon lie. 10

Page 889, line 39: "I understand from what you tell his Honour that you did not regard this as a very important matter at all? A. Not after 11th January". Since that accords exactly with what we are putting, it is of some significance. Here is his own statement, out of his own mouth, not suggested by me because I understood he was saying it was not a very important matter at all, but his answer was "Not after the 11th January". No date had been suggested to him in relation to that matter. Strangely this is exactly what we are putting. "Do I take it up to the 11th January you did regard it as an important matter ...". The neighbour's phone number could only come from something Follington told Barton. He tries to explain why it is that Barton would want to contact him when he is off duty through his neighbour. Line 38 "Vojinovic is wanted in the State on a warrant of first instance ... Mr. Barton may contact me ... Vojinovic was in custody. Here is a man who has absconded from bail on a charge of break enter and steal, a not insignificant charge. He goes to Victoria and they know exactly where he is, and they are informed. "What did you do about it? A. I contacted the detective who was in charge of the original inquiry on which he absconded. He informed me there was no extradition desired". 20 30 40

Again we find that in the administration of justice by the police department it falls to individual policemen. When one is referring to something that the police have done one tends to imagine that all decisions ultimately emanate from the Commissioner down through a hierarchy. When you examine the evidence in this case you find that that is not so. Each decision is an individual decision of an individual policeman. If Follington speaks to the detective who was in charge of Vojinovic's break enter and steal, and they decide he won't be extradited, he is not extradited, and that is the end of it. Since it is our case that nobody wanted him back here, least of all the police, one sees how that is brought about. 50

"In other words it was quite all right for him to leave the State of New South Wales ... the

department would not stand the costs". Mackie, who had visited Hume in his house, was the man who said the department would not stand the cost of getting Vojinovic back to Sydney.

"Are you telling us there was an official application to have Vojinovic extradited from Melbourne at the end of his sentence ... he said there would be no extradition". Mackie, who is known to Vojinovic and visited Hume at his premises, is the man who eventually said there would be no extradition of Vojinovic to face the charge on which he absconded. All in all this is a disgraceful perversion of justice. 10

I won't take your Honours through the evidence about where the police cars were and the special arrangements made and Follington walking across the park leaving his car at the police station near St. Vincent's and the other car parked around another lane.

At page 895 one gets a clue to it. Line 13: "It was after 6.15 p.m. I made three phone calls, one to Sergeant Wild's home, one to Mr. Lendrum's home, and the other one to Sergeant Wild's home". This was not regarded as any minor meeting. Inspector Lendrum was well in the picture. The plans doubtless were discussed with him immediately prior to Vojinovic being picked up. 20

Page 896, line 22: "If you came from that direction why did not you stop in the park? A. Because there was better cover over at St. Vincent's Hospital". This was no invitation for a cup of tea. This was a capture of a criminal regarded as dangerous. 30

We are seeking to convince the Court these police are liars, and in this case particularly Follington. The only things we can go on are concrete facts. An untruth may be told about conversations. Where we have a concrete fact we are able to put that to the Court or to the witness and see where that fact leads one. 40

At page 899, line 43: "Did you believe that Mr. Barton needed any form of police protection? A. No ... Did you believe it was reasonable to arm himself against attack? A. No, very foolish ... you load your own bullets". This showed that there had been a detailed discussion between Follington and Barton or his son about firearms. Otherwise did we get the information that he loads his own bullets. That is an unusual thing to do. Line 36: "In the top of your locker you keep a container with bullets? A. No ... it is in the bottom of the locker". How would anyone acting for Barton know he keeps bullets in his locker? Then he deals with the different sorts of bullets. Page 901, line 10: "Can you offer any explanation how Mr. Barton or anyone would know you load your own bullets? A. Yes ... your only purpose of teaching Mr. Barton 50

about guns was safety ... I am sure the Commissioner of Police would have taken some action against me". That is unreal. How many rifles are sold without the police worrying about them? Page 902, line 25: "What is complicated about it ... (reads on to page 903) ... He could effectively use this rifle for self-defence? A. He could use it but not effectively ... to make sure if he had to shoot he shot the right person? A. Yes".

That was one occasion where the cross-examination had some degree of success. We had a point to go on. We had the fact that he bought the rifle and went to the police rifle range. Eventually Follington was forced to admit that he taught this boy how to shoot and aim this rifle for self-defence. Obviously there was no other reason. He started off by saying it was very foolish of him to get a rifle and "all I did was see that he did not shoot himself". I know it is monotonous when counsel keeps on saying lie lie lie, but it is true, the whole substance of this witness's evidence is untrue and incapable of being relied upon. In our submission only one finding should be made and that is he is a person incapable of credit. 10 20

Wild, having made a mistake at first, ends up by saying that he made a conscious decision not to seek out Hume during the first week after the inquiry. I know he says the opposite at one stage. The end of his evidence is that he made a conscious decision. We asked Follington about it. The only reason this cross-examination is successful is that we have Follington cold. We had his own document in his own handwriting. Page 903, line 32: "During the first week after the Sunday did you make efforts to contact Hume and Ziric? A. Yes ... on whose instructions did you make these enquiries? A. Detective Sergeant Wild's". How does that square up with Wild's evidence that he made a conscious decision during the first week that he would not seek to interview Hume at all? "Did you go down to the office in Riley Street? A. No ... I attempted to ring there". Here you have the spectacle of a detective of the C.I.B. trying to contact a man, a licensed gun holder, a licensed inquiry agent, and he has to explain now how he could not contact him for more than a week when it is alleged he is involved in a conspiracy to murder. You see him twisting and turning and telling untruth after untruth. He had his telephone number. "You telephoned the office at Riley Street and spoke to Mr. Hume. What happened? A. To the best of my recollection there was no answer ..." Hume had a secretary, Miss Catt. On the evidence she was there all the time. Either they had taken flight because Hume knew the police were trying to get them through Detective Sergeant Mengler, or Follington is telling an untruth. "How many times did you phone him? A. I could not tell you ... I think it was on the night of the 8th". On the night of the 8th exactly as you would 30 40 50 60

expect, Wild directs Follington to get hold of Hume. Wild says he made a conscious decision not to try to get Hume during the whole of that next week, which takes you up to the 15th or 16th. One of the two police is lying. On this aspect it can only be Wild and the reason is obvious.

I have not quite finished with the glovebox matter. We called Harden & Johnson. I will refer your Honours to that evidence later.

One cannot emphasise too highly how significant this is when you think of the interview with Hume. Here is Follington's sworn evidence, and it is not suggested to him, it is just a clear straight question: "When did Detective Sergeant Wild instruct you to make these enquiries? A. Testing my memory again, I think it was on the night of the 8th ..."

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One can fairly submit that Wild's evidence that he made no decision not to seek out Hume at any stage is simply untrue, remembering the evidence of what happened on the Sunday night, and that throws a gross doubt on the possibility that no statement was taken from him within the next couple of days.

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The next matter, at page 906, I would say is somewhat inconclusive. It is in fact inconclusive cross-examination. I am putting to him that he had this conversation with Mr. Peter Bowen, who was Mr. Barton's solicitor. I put to him at line 36: "Did you say to Mr. Bowen these words 'I won't have any trouble getting another statement'... he knows it". He does not positively deny that. He said, "No, those words have been moved around, I think, Mr. Gruzman". Then I said to him "What was ... A. No". Then he said he discussed with Vojinovic - (read). That is inconclusive. He did apparently mention Mr. Abe Saffron in conjunction with Mr. Armstrong, and apparently they both had white cars, as did Barton.

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The answer on page 909 at line 39 may be of some significance: "Did not you say this to Mr. Peter Bowen in answer to the question I was told of something that was in his house" - just remembering that this was back in November, long before these proceedings started, here is Follington being told by Barton's Solicitor of something that is in Armstrong's house. It is significant that in the record of interview Hume said that Armstrong had stolen property in his house. It is fairly obvious, reading this conversation - so far as it is admitted - that something of that kind was under discussion in November, 1967. I put to him at page 910, line 3, "The fact is that in Mr. Peter Bowen's office ... permission of the Commissioner of Police". One would know from our knowledge of these matters that he was not allowed to give interviews without the permission of the Commissioner of Police and without the proper fee being paid. Here he is,

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he could not deny that he went to Bowen's office and the evidence is that he went there with his wife, who stayed outside, and he took the notes. The question concerning the papers in this matter are involved, and where they were. This only slips out of Follington, and this is in November that Barton and Bowen are obviously concerned about the police documents. "My answer was that Detective Sergeant Wild had them ... what Mr. Barton has told me". Is not that a frightfully significant matter? Here is Barton, who was not a close associate of Armstrong in the sense of being a family friend and who could only have got his knowledge of stolen jewellery in Armstrong's house - a fantastic sort of thing to say about anyone, particularly one in Armstrong's position to whom a few hundred thousand dollars was neither here nor there - to say that he had stolen jewellery in his house sounds fantastic. He could only have got this knowledge from the interview that led to Exhibit 29. Here it is: "What do you know about jewellery ... what Mr. Barton has told me".

I do not think your Honours would require much more proof that Exhibit 29 is a real document. There is a lot more, a mass of it. "He asked me ... available from Hume" - out of Follington's mouth. I put it to him that he said he could get another statement from Hume and he said what was put to him was whether there was a statement available from Hume. I said "No ... there seems to be a lot of white cars in this inquiry".

It goes over to page 920: "Just repeating what was said about the documents ... statement could be obtained from Hume". It is obvious that what Barton was concerned about - back before this case ever started - was the custody of these documents on which he relies, and of which he realised the value. I put "Lock, sir, no-one would be suggesting that Sergeant Wild had custody of the Melbourne Court documents ... well, I never saw one. I was not present at the interview between Detective Wild and Hume". His answer on this vital point is, your Honours may think, of some significance. Then he was asked "Has that document ever been shown to you? A. No".

We understand fully the difficulty and the task which we face and upon which we ask your Honours to embark but in our submission there is a fair case here. Here is Follington, disowning the Hume document - disowning the non-existence of the Hume document - so you are dealing entirely with Wild, and Follington told Barton that Wild was working for Armstrong. I venture to suggest that never has a stronger case of this kind been presented to any Court.

Then I asked him some questions about what he was doing in the early stages: "Take Vojinovic ... asked Sergeant Wild for that". In other words, he was not even allowed to do that. "You

could not look at the document without the permission of Sergeant Wild ...". Remember that Wild said, of course, that he could have got it. Follington says in answer to the question "You say it would have been a physical impossibility ... but I think the only place you could obtain that would be the firm that makes the lockers. They keep a record of them". He says there is no duplicate key system. Wild says there is a duplicate key system, so that he could just open a locker, but this man denies it and says you have to go and buy a special key - " ... not in the Safe Squad office, and I certainly know nothing about it" - referring to the duplicate key system.

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Remembering that it locks on the evidence as though Wild was the one who destroyed Hume's record of interview and that Follington has already disowned it, let us now at the next question and answer - another significant piece of evidence - at the top of page 916: "Can you offer any explanation ... that I cannot understand". That is a dark and sinister statement, having in mind the seriousness of the allegation that has been made. Follington is completely separating himself from complicity. It is Wild alone with whom this Court is concerned on the question of this document. Can you imagine that between two men, working together on the one case on which they were over a considerable period, because Follington said he was in it as long as Wild, and can you imagine in the normal course of events he would not have known exactly what was going on? When he has to deny it and throw it onto Wild it is obvious that in his mind this statement existed and Wild destroyed it.

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On this point about the Vojinovic document I put to him at page 916, line 38, "You are prepared to accept ... I do not know who did". So that, right out of the mouth of Follington, there is a tremendous amount of confirmation of the existence of the record of interview with Hume. Indeed, it flies in the face of almost every piece of evidence in the case to suggest that that record of interview did not exist.

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Turning from that just to show how Follington was prepared to tell some untruths about this glovebox; it is only an indication that if a man is a liar, he is a liar, and if he is doing it deliberately that is the position. Nobody can say they cannot make a mistake. Anybody can make a mistake. If you make a mistake, eventually you must admit it. You can give a wrong answer to an examination paper and someone can say "You see, that is wrong?" and you would say, "Yes, I made a mistake".

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We went to the trouble of calling someone from Harden and Johnson, where the car was bought, to obtain the original registration, and this appears at page 917 (read). He won't admit it. He maintains that there was a glovebox there and

a glovebox lock and he could see himself locking it, and so on.

Of course, when he gets back to the police station (page 919) he cannot remember how he ever got his gun back. He does not know. At line 23: "Does it not strike you as odd that you cannot even remember how you got your gun back? A. No, not particularly ... no". Then at page 921, line 15, "Weren't you concerned to know where your gun was? A. At that stage ... I was watching". Again we are suggesting to your Honours that Follington sought to suggest to the Court that this was an unimportant matter, and so on. But here he is, on his own admission, watching Vojinovic so closely that he was not concerned with where his gun was. 10

A further strong indication that this is a criminal or a potential criminal, and not just a casual meeting, is shown here: "That is what I was putting to you, that you were too busy with Vojinovic ... that is what I tell you, Mr. Gruzman". So, that is an attempt to downgrade the events of that Sunday night and of the meeting with the informer, which has no basis for foundation whatever. 20

At page 922, line 7, the fact was that on the next day, the 10th January - "... inquiries to locate Hume and Ziric" appeared in his notes. I put to him, "Where did you get the name Ziric from?" because in Vojinovic's statement it is Momo, and he said that he relied on Hume. "You may have known the name Ziric at that time ... possibly, yes". Again that is a vital admission by Follington - who worked on the case with Wild, that he did not know whether or not this statement which is in dispute had been obtained from Hume. That is as at 10th January. The statement, I would say, does refer to Ziric but whether it did or not, once contact had been made that is where the name would come from. This is the cogent evidence that of the two partner police officers one admits the possibility that what the plaintiff is putting is true and there is only one man who denies that that interview took place. 30 40

I now turn to page 929. At line 24: "Was not the whole point of inquiry in your mind up to that time to locate Hume and Ziric and get statements ... I understand that he did not have a further conversation with Vojinovic". We say that he did, and that is when the \$300 was paid over, but in any event he admits that he did - "What did he tell you ... and the rifle range? A. Yes". 50

How ludicrous all this is; that Wild is supposed to have indicated to Barton on the morning of the 11th that there was nothing in it - the day he leaves his home and sends his parents to the country! All of this, your Honours, must be untrue. There cannot be one word of truth in it. It is a shocking business. Nobody likes to dwell on it, but it is proven up to the hilt.

You have the position now that something obviously happened on the Wednesday. Wild told Follington on the Wednesday, "There is nothing in this, forget it", yet we know, of course, that there was the apparent interview on the 18th with Hume with no notes taken and no record of interview, and then the interview on 19th with Zircic and no record taken. There can be no truth in any of that. All that happened was presumably that Wild got Hume's statement and then in some way or other - we do not know the exact machinery - Armstrong got to work to do exactly what he said he could do - have the police destroy their evidence. Wild was quite prepared to do it, but probably required assurance that Vojinovic was out of the road and that the deal with Barton had gone through so that there would be no trouble from either source. He was a party, part and parcel, to Vojinovic being kept out of the State, and your Honours might think, not being brought back. Follington checked to see if the Barton and Armstrong transaction has gone through.

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At each and every point there is proof, and a major point is that according to Follington it was all over on the Wednesday. Barton came in and was told it was all over. And, having been told that there was no substance in the whole matter, he suddenly disrupts his whole life!

Your Honours may also, perhaps, contemplate that if - as was said here - there was no substance in it and for that reason it was known on the Wednesday, or that this had nothing to do with Armstrong and had no commercial context whatever - it is only Vojinovic - but as at the 17th they got word that Vojinovic has been arrested in Melbourne, so they then cannot connect these threats with the commercial matter because this is Vojinovic, and they know he has been arrested in Melbourne. Then, why is Follington having two or three interviews with Barton and ringing him up to see how the commercial transaction is going on the 18th and why is Follington visiting Barton during the course of the ensuing year?

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So they pile untruth upon untruth at every point. I do not think your Honours could name one aspect - I may be sticking my neck out a little but I am sure his Honour, Mr. Justice Mason, will pull me into line - I do not think there is really one aspect of the evidence of Wild and Follington that you could really feel safe about.

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Here is another point: Remember Wild telling these ridiculous stories that he went to see Vojinovic just because he might turn into a common informer? Then there is Follington's evidence at page 944, line 12: "Q. Was it your understanding when he left that he was going to ... Sergeant Wild, undoubtedly, yes". Again giving the lie direct to the mass of evidence that Sergeant Wild gave, trying to explain these entries

in his own notebook - "Waited to 11 a.m., informer, about Barton-Armstrong matter" and so on.

Just to add a little to the store of knowledge about Hume, at page 95A "You had a friendship with Mr. Hume for a number of years ... I made an appointment to see Wild". What was the difficulty with the police speaking to him? Then at page 946, line 32: "You are telling his Honour ... I telephoned his office". At page 947, line 25, "Did you receive certain sums of money from Mr. Barton? 10
A. No, I did not ... with my four days off". It is significant that it is suggested to him, amongst other things, that he has four days off and it turns out that he has four days off. "What things? A. I have got a wife and children and I like to look after them ... Have you been to Goulburn?" he said he went there with somebody - he went through there.

Perhaps I should give your Honours a reference to Follington's evidence about this document that was not produced to the Court. He was further cross-examined about this document at page 2012 (Vol.6) and at page 2013 he was asked: "The whole of the documents ... A. Yes". I might say to Mr. Justice Taylor that I had in mind this evidence when I was addressing your Honour and when your Honour referred to Sergeant Anderson - "What did you do with the document then ... to Mr. Forbes". Then at page 2014, line 48: "I'm sorry, I gave it to Sergeant Anderson for him to decide ... I am not sure which one". 20 30

At page 2019, line 37, "Was it your evidence in these proceedings ... I cannot recall seeing him there". As opposed to that, Hume gave evidence that during the interview Follington came in, towards the end of the interview, and asked (I think it was) three questions. "I put it to you, Constable Follington, that you were present at the original interview with Hume? A. That is a lie ... at the Wentworth Hotel? A. No". 40

As your Honours know, Mr. Forbes subsequently came before his Honour and his Honour accepted what Mr. Forbes had to say, that nothing of the kind said by Follington took place. That is a matter which I again put before your Honours as a grave and significant reflection on Follington's credit; that he swore a whole series of matters which were subsequently shown in an undisputed way to be untrue. It means that Follington was telling an untruth or what Mr. Forbes, from the Crown Solicitor's office, was telling the Judge in Equity an untruth. His Honour, having heard Follington's cross-examination, never hesitated for one moment, notwithstanding that he had made some mention about Mr. Forbes when Mr. Forbes was not there. But his Honour, having heard Follington, never hesitated for one single moment and accepted what Mr. Forbes said without having him sworn - as against Follington's sworn evidence. Which rather indicates 50

that if his Honour had been minded to make a finding on the credit of Follington or Wild there would not have been much doubt about what his Honour would have said.

Just contrary to Follington's evidence there, I will give your Honours the reference to Hume's evidence at page 1706 (Vol.5). I do not think your Honours will have to refer to it, but at line 11: "Q. For a certain period of time when you were first interviewed by Sergeant Wild, Sergeant Wild, Constable Follington and yourself were in the room together? A. No. I will have to explain". Then I suggested to him that Follington must have been overhearing the questions of Wild for Wild to have said to him, "Have you any questions in addition to the ones I have asked?". That supports the fact that there is a conflict between Follington and Hume as to whether Follington was present in this room.

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I am about to go to a new subject matter, which is Exhibit 29.

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(Luncheon adjournment).

MR. GRUZMAN: We are coming back to the next stage of our submissions and these will revolve around Exhibit 29, the alleged record of interview with Hume. His Honour, Mr. Justice Street, made a finding on that and amongst other things his Honour said (page 3178) "It is further contended on behalf of the plaintiff that Mr. Armstrong brought pressure to bear on Sergeant Wild ... ever existed". His Honour reached that conclusion without having the benefit of his Honour's discussing or going through the evidence on the credit of the police. That is why I think your Honours might see now why we sought to rely on and invite your Honours' attention to the detail of the evidence on the police so that your Honours might make a finding on their credit. We would approach Exhibit 29 on the basis of the credit of the police. But looking at what his Honour found in his judgment: "... that Mr. Armstrong brought pressure to bear ... that such a statement ever existed". - because his Honour, and your Honours know that we say this with great respect to his Honour, Mr. Justice Street, his Honour did not analyse the evidence and his Honour did not realise what in fact occurred; namely that it was not two police involved but it was only one. And that is the big point. There is no suggestion, and cannot be any suggestion, that Constable Follington had anything to do with the Hume document because if one thing is clear in this case it is that Follington said that he does not know whether the document existed or not. He never saw it, he never would see it, it may have existed or it may not, but he knows nothing about it. His Honour, with all respect to him, is wrong in saying that it is a question of whether these two police co-operated or had anything with the destruction of the document or

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the denial that the document ever existed. Indeed, when one looks at this significant matter, at first sight it appears that Mr. Barton is, shall we say, at odds with the police department about this - that is, with officials. But when one looks at the evidence, that of course is not so. Superintendent Blissett had nothing to do with this. Inspector Lendrum had nothing to do with this. No superior officer of Sergeant Wild had anything whatever to do with the Hume statement. There is no police record, no police book in which documents of that kind are recorded, which would require alteration. The document just stood as a document. There was no official police record other than the document itself. No superior officer of Wild was involved and the man he works with denies responsibility for it. 10

TAYLOR, A-J.A.: Do I understand that you are saying that Wild typed it and only Wild knew about it? 20

MR. GRUZMAN: Yes.

TAYLOR, A-J.A.: That would be an extraordinary state of affairs, for only one police officer to be involved.

MR. GRUZMAN: Yes, but that is the evidence, firstly by Mr. Barton - that obviously it was not typed by Follington because his name was not on it. And, your Honour, in this case there have been interviews acting on his own. His mate, Detective Whelan, was away, and he used Follington when he wished and, indeed, Wild swore that in the interview he had with Hume on the 18th there was no-one else present. Follington says that he was not present and Hume says that Follington came in at the end of the interview and asked two questions. 30

So this is the first amazing thing that occurs, that the existence or non-existence of this document is purely one man's word against another man's word: Mr. Barton's word against Sergeant Wild's word. And one should remember, I think it is proper to say this, that Sergeant Wild at the time was a senior detective in the C.I.B. There was evidence that Inspector Lendrum thought he might have to sit in judgment in Wild's actions, but one judges Wild, I suppose, as he was then. There is no evidence to show what he is now, and all we do know is that he, according to Inspector Lendrum could well have had to face an inquiry because of his conduct in this matter. But here we have - I say at risk of repetition - a situation where it is not Barton against the police department, it is Barton against one single solitary policeman. That is why I have been at pains to show to your Honours that this policeman is not to be believed on his oath. 40 50

JACOBS, J.A.: I just want to be quite clear. Do you say Detective Follington never saw this statement at all?

MR. GRUZMAN: Yes, your Honour; he said so.

JACOBS, J.A.: I know, but you have been reading it out at length and you use the word "Swore" with an almost holy sound about it and you have been trying to convince us that we should not believe what he swore. I am talking about what your case is, what we should infer - that Follington knew nothing about the statement?

MR. GRUZMAN: Of course if it was Follington who in fact showed the document to Mr. Barton - -

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TAYLOR, A-J.A.: Your whole case was that Follington conspired to get it, and yet a moment ago you told us only one man knew of its existence.

MR. GRUZMAN: What I am putting is that on the evidence that is what they are saying.

TAYLOR, A-J.A.: Make up your mind. Is it your case that both Follington and Wild knew about it, they saw it and both agreed to suppress it?

MR. GRUZMAN: Yes.

TAYLOR, A-J.A.: We have two police officers?

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MR. GRUZMAN: Yes.

TAYLOR, A-J.A.: So it is not true to say it is Wild's word against Barton's?

MR. GRUZMAN: According to the evidence what happened is that Follington tried to disown the whole matter. Follington is prepared to say, in effect, it may be true or it may not.

JACOBS, J.A.: That is all he can answer.

MR. GRUZMAN: That there may have been a document or there may not?

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JACOBS, J.A.: Yes. I would have to make the same answer if I were in that witness box.

MR. GRUZMAN: There may have been a document, when the suggestion is that he showed the document to Mr. Barton?

JACOBS, J.A.: Let me start again. I want to distinguish between what the case is that you are making to us and the evidence that was given. I have understood your case to date to be that the two policemen agreed, conspired, acted (whichever you liked) to suppress a statement which was taken on the 11th from Mr. Hume and which was in fact shown by one of them to Mr. Barton. I understood, in the course of that, you challenge the veracity in the witness box of both those policemen and you ask us to accept the evidence of Mr. Barton that he had been shown the statement. Now, if he was shown the statement, that involved two policemen, did it not?

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MR. GRUZMAN: Yes.

JACOBS, J.A.: So when you said a little while ago that this was a question between one of these police and Mr. Barton, I demurred to that submission - -

MR. GRUZMAN: Yes - if I may say so, your Honour - rightly. It was an inaccurate submission insofar as it was based on our case. I was looking at it from the point of view of the evidence from the police side. One would have thought -

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MASON, J.A.: But you criticised that passage in the judgment of Mr. Justice Street.

MR. GRUZMAN: Yes, your Honour, and I was wrong. I was looking at it, of course, from the police side because it would have followed - as I submitted this morning - that Follington would have known as much about it as Wild. It is hard to imagine two men working together on a case and Hume makes a statement to one and his partner on the case does not know anything about it. It is impossible to imagine. That is why I was taking the point that Follington was in effect prepared to confess and avoid, and say there may have been a statement or there may not "but I knew nothing about it" - which we say is untrue; he knew about it and he suppressed it.

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Rounding off that submission, perhaps I should point out that what you have got is Barton's word on the one side and, on our case, it should have been Wild and Follington on the other. But, in fact, Follington - as I put it - confesses and avoids and says "leave me out of it. I don't want any part of it".

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TAYLOR, A-J.A.: He did not confess and avoid when you put it to him that he showed the statement to Barton. He said he did not. That is not confessing and avoiding.

MR. GRUZMAN: On the other hand he said he knew nothing about it, that it may have existed or may not. So there are two questions: (1) Did it exist and (2) did he show it?

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TAYLOR, A-J.A.: If the answer to the first one is No, you do not need to bother about the second.

MR. GRUZMAN: Yes, but I put it this way: Would one not have expected Constable Follington, who was the second man on the team, to have said "Sure enough, if there had been such a document I would have seen it. I was in the investigation. I was the man responsible for Hume. I was looking for him and I was still looking for him up to the 18th. It is impossible that any statement was taken from Hume prior to the 11th". That is what one would have expected Follington would have sworn, but he did not. On the contrary, in respect of the

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statement alleged to have been taken prior to the 11th, he said "Maybe yes, maybe no, but I never saw it". We put that as confession and avoidance. There was only one answer Follington could give if he was going to support Wild and that was that there was no such statement in existence, "or I would have known". As he won't swear that, we take that as half an admission, certainly not a positive denial - which was absolutely requisite in the circumstances.

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That is what I mean when I say that in the end it is Barton's word against Wild's. Wild is the only one who swears there never was any such document in existence, and it is a matter of comparing the comparative credit or credibility of one man (Wild) and Barton. Having heard Wild's cross-examination and having made a decision on Wild's credibility, your Honours, in our submission, could come to only one view.

JACOBS, J.A.: When would you suggest that they would have destroyed the document?

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MR. GRUZMAN: When? Our submission on that is that on or about the 11th, when Follington swore that Wild said "There is nothing in it, stop everything", the arrangement had been made to suppress or destroy. After all Wild was taking a bit of a risk and at this stage there were two outstanding matters. One was that Vojinovic could say something in his Court proceedings in a few days time, on the 16th. The other was that the Barton and Armstrong matter would flare up. So before he could take the risk of destroying it he had to be satisfied on two matters. So Vojinovic is taken to Melbourne either the same or next day and the arrangement put in train. I have not taken your Honours through the detail of the evidence of how he was persuaded to stay there by Novak and so on, because it is lengthy and complicated.

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TAYLOR, A-J.A.: Apart from your assertion where is there any evidence that Vojinovic was likely to say anything about Barton or Armstrong in the Redfern Court when he came there on 16th January? You want us to act on the assumption that he would say something about it. Why should he say something about Barton or Armstrong when he was charged at Redfern with break, enter and steal on the 16th?

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MR. GRUZMAN: The possibility is what we are considering, and it is possible that one does not - -

TAYLOR, A-J.A.: If we do not know, let us dismiss it from our minds.

MR. GRUZMAN: One has to draw the inference.

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TAYLOR, A-J.A.: How can you draw an inference that a man who is going to face a charge at a Court, a charge which has nothing to do with this case, is going to say something about Barton or Armstrong? To whom is he going to say it; to the Magistrate?

MR. GRUZMAN: No, he might say something in amelioration of his penalty - say how helpful he had been to the police. Why not?

TAYLOR, A-J.A.: That, Mr. Gruzman, is a product of your fertile imagination.

MR. GRUZMAN: No, with respect.

TAYLOR, A-J.A.: He would be more likely to talk about his wife and children, if he had any, would he not?

MR. GRUZMAN: He might wish to be regarded by the police as of good character, not likely to be involved in anything because he had given information to the police. That is the evidence. I put it on the possibility that here was Vojinovic going to go in the presence of other police and a Court in five days' time with the imminent possibility that a fellow like that, knowing that he was going to go to gaol, would do anything to try to keep out, and one of the things he might have done was to say "I helped the police with information for murder" - he might say that to the police. 10
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TAYLOR, A-J.A.: Because that is likely to happen you want us to take that into account as part of the basis on which we make a finding?

MR. GRUZMAN: Yes, your Honour.

TAYLOR, A-J.A.: I think that is irresponsible.

MR. GRUZMAN: Your Honour could dismiss everything as irresponsible.

TAYLOR, A-J.A.: That is completely irresponsible to me; that I should make a finding, as a Judge, on something that I think a man might say. 30

MR. GRUZMAN: Exactly, when your Honour is delving into the human minds here.

TAYLOR, A-J.A.: I thought it was tongues that we were concerned with; what they might say.

MR. GRUZMAN: That is right, but most people say what they think about.

TAYLOR, A-J.A.: Mr. Gruzman, you have put your submission. 40

MR. GRUZMAN: Look at it in another way. Here was a man who, on any version, had told this story to the police. Whilst he was in Sydney and able to tell this story to other people, perhaps have contact with Barton, one does not know what he would do, but he would be obviously a great embarrassment. You could not take a risk while Vojinovic was around and active that the matter would not blow up again.

TAYLOR, A-J.A.: On what basis am I supposed to make that finding?

MR. GRUZMAN: Commonsense; in the same way as they say to jurors "You do not leave your commonsense at home".

TAYLOR, A-J.A.: You do not have to remind me that I am being treated as a jurymen here Mr. Gruzman.

MR. GRUZMAN: Your Honour is performing a function which, if I may say, is part judex and part jury. Your Honour is here making findings of fact and when your Honour in effect accuses me of addressing your Honour as a jury, I accede to the proposition. 10

TAYLOR, A-J.A.: How could you deny it?

MR. GRUZMAN: If I had to deny it I would not have been doing my job. I am asking your Honour to make findings of fact and I hope I am appealing to your Honour's logic and not any other emotions, because that is what I am seeking to do. We are asking your Honour to make findings of fact as the jury would, in substitution for the jury, remembering that according to the evidence - I suppose it is clear on both sides - Wild said Vojinovic wanted money, Barton said Vojinovic wanted money and Vojinovic wanted money and got money. If Barton had said that he was prepared to pay money to catch Hume and Armstrong, what a risky situation it was with Vojinovic at large in Sydney - Barton prepared to have money paid to him to get evidence to bring Armstrong and Hume to justice! What embarrassment, and what a risk, with Vojinovic running around Sydney. 20 30

We put to your Honours that one of the possibilities is that the matter may have come to a head if Vojinovic wanted it so when he came before the Court on the 16th. But there are other ways. It does not need much imagination to see that Vojinovic was a tremendous risk. Of course, if you were to accept him and if you took Wild's point of view that he was not going to allow Barton to pay money to Vojinovic, there was all the more reason why Vojinovic might have got in touch with Barton to show that Wild was doing nothing, and so cause trouble. 40

To answer the query of your Honour Mr. Justice Jacobs, the first of the two matters which stood in the way of the destruction of this document was Vojinovic being around and reactivating the matter in some way or other. The second was, since much occurred in the context of these financial arrangements between Barton and Armstrong, and one of the needs was to see whether they had been done, and that is why you have Follington so concerned, ringing backwards and forwards on the 18th, "Has it been finally signed, sealed and delivered?" 50

Once those two things had been done - Vojinovic out of the road and the commercial deal completed for better or worse - then it was unlikely that the matter would flare up, so it would be safe then to tear the thing up. Is not that what happened? Is not that exactly what happened? Vojinovic was put safely out of the road, so he said nothing. The Barton and Armstrong deal went through and nothing further was said - apart from the subterranean work with Follington. But basically nothing happened for over twelve months. 10

One of the things that your Honours might think weighs most heavily in favour of the existence of this document is what Follington states that he said to Mr. Bowen. Here was Barton's concern for the documents, and I would like to stress that word (which is Follington's word, not put to him in cross-examination or suggested by counsel, but his own unaided version of what he said happened, that Barton was concerned about "documents" not in Melbourne but in Sydney) - "documents". There is only one document in the case which the police saw and that is Vojinovic's statement, of which he had a copy anyway. So it is perfectly obvious that in November of that year Barton is worried, that there was Vojinovic's statement and another statement, Mr. Hume's, and particularly you may remember the statement where Armstrong is dealing in stolen jewellery is referred to. This is before there was ever in contemplation - in the sense of consulting counsel or anything of that nature - this case. It did not commence until January and I think there is evidence that the first consultation was not until about Christmas, 1967. 20 30

So before the issues in this case or anything about it were considered, let alone formulated, Barton was worried. The only inference is that the Hume statement had been preserved. One of the first things that happened, according to the evidence, was that this statement amongst other things was subpoenaed by the police. 40

JACOBS, J.A.: What are the dates you say were the interviews with Mr. Barton and Mr. Miller? Was that on the 8th? You say that on the 11th not only was the statement taken from Hume but it was suppressed on that day?

MR. GRUZMAN: No, I put that the statement was taken, so far as I can submit on the evidence, on the 9th or 10th and shown to him on the 11th, but later that day suppressed - probably that day or the next day. When I say "suppressed" I am working on the evidence of Follington who swears that on the 11th he was informed there was nothing in this - "stop work. That is the end". From that we infer that was when the arrangement was made that there was to be no further investigation. 50

JACOBS, J.A.: What time did Mr. Barton say he

saw Sergeant Wild or was shown the statement on the 11th?

MR. GRUZMAN: I think it was about 1.30 or two o'clock after buying the gun.

MASON, J.A.: Follington brought him back, having purchased the gun and took the statement from the folder and showed it to him - in Detective Sergeant Wild's room.

JACOBS, J.A.: And then, he having left, they suppressed it?

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MR. GRUZMAN: Yes, to make a deal.

TAYLOR, A-J.A.: Who made the deal?

MR. GRUZMAN: We would say that, looking at the two men and what they did, it was Wild.

TAYLOR, A-J.A.: You would not be sure of that?

MR. GRUZMAN: No.

TAYLOR, A-J.A.: But you want us to make that finding?

MR. GRUZMAN: Your Honours are entitled to make a finding on what the evidence permits. That is the question.

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TAYLOR, A-J.A.: It does not permit us to say who made a deal.

MR. GRUZMAN: No, the evidence does not permit you to say who made the deal, but, in other words, if a man is shot in a room and there are three men there with smoking pistols the Court would not find any difficulty in finding that one or all of them was or were responsible.

TAYLOR, A-J.A.: It would depend on how many times he was shot, would it not?

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MR. GRUZMAN: It would help. In other words the Court does not, if I may say so, leave its common-sense at home. If the proper inference is to be drawn is that an arrangement was made between A and B or between A or B on the one hand and on the other hand between C and D or C or D and the result is produced, then the Court won't look at the niceties of seeing whether or not it was between A and C or A and D, and saying "We are not sure whether it is between A and C or A and D", and all the different permutations. The Court is concerned to know what was the proposition and what was the result, and it has the evidence to make a finding that the result was produced by A.

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The inference that it was Wild is perhaps strengthened by the fact that he was the senior man. He was the man who, according to Follington,

told Follington "Stop work - finish" and told him that on the 11th. And of course the situation arose that notwithstanding that is Follington's evidence and in part - your Honours will remember Wild's evidence that he sought Hume on the 8th - nevertheless they could interview Hume with an informal interview on the 18th after Follington had sworn that Wild said there was nothing in it.

I do not know whether I have fully answered your Honour Mr. Justice Jacobs. We say that the arrangement was made probably on the 11th, maybe on the 12th, but it could not be safely implemented until Vojinovic was out of the road and the commercial deal was done. So our submission would be that it was immediately after the commercial deal had been finished and the Hume document was destroyed or otherwise dealt with. To put it in another way, on the 11th or the 12th the contract to suppress was made and it was completed on or after the 18th. 10 20

I am going to go to Exhibit 29 and I think your Honours will find that I am able to present it in a not unhelpful way, having in mind that there is a mass of material to go through. But before doing so, I want to put some general submissions, and these are just numbered submissions:

- (1) Armstrong said he could have police evidence destroyed.
- (2) On anybody's version Hume was interviewed. 30
- (3) Lendrum said in a statement could have been taken. Barton obviously had no way of knowing Inspector Lendrum would come and give such evidence.
- (4) Barton said he saw the statement.
- (5) Hume says that Wild took notes.
- (6) Wild says that he took neither notes nor statements. 40
- (7) There are things in the statement itself - and we are going to look at the intrinsic evidence in the statement itself shortly - which are either (A) impossible or (B) unlikely - that Barton could have known unless he saw such a statement.
- (8) Barton's concern, as shown by the subpoenas to the police, at a stage before he knew or could have known that there was any difficulty about getting statements about the interview with Hume and bearing in mind 50

that, I suppose, it would be true to say that days of this case, one way or the other, were devoted to the production of documents by the police. It was a major issue in the case and I think there is evidence before your Honours that his Honour, Mr. Justice Street, actually allowed extensive cross-examination of the police at a time before the case started to try and procure production of documents. It was a major issue throughout the case.

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- (9) Barton, as well as describing the statement, was able to describe the folder. The folder was produced, but empty.
- (10) Although Hume had said that Wild took notes, no notes by Wild of his interview with Hume were produced.

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JACOBS, J.A.: Talking of notes, were the actual notebooks in Court?

MR. GRUZMAN: Yes.

JACOBS, J.A.: Are they there - Sergeant Wild's and Detective Follington's? It was only a copy of the notes that went into evidence?

MR. GRUZMAN: Yes, we had access and his Honour had access to the notes. The notebooks were basically written in shorthand and I do not think the Court suffers at all from the fact that the original documents are there.

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JACOBS, J.A.: You have to face up to a situation, as you obviously do, that these notebooks were not contemporaneous.

MR. GRUZMAN: Were not contemporaneous?

JACOBS, J.A.: Yes.

MR. GRUZMAN: The point is that the evidence shows that the police put in the notebooks what they want to.

JACOBS, J.A.: That is what I mean by not contemporaneous; this scheme that you build or infer had been worked out before Sergeant Wild had written up his book for the day.

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MR. GRUZMAN: No, it does not follow, with respect, for this reason: Sergeant Wild, in dealing with Hume, was dealing with a man in a situation where he did not know what was going to happen. If you imagine for a moment that Sergeant Wild was the sort of man who would subsequently make the sort of deal that we have suggested (in other words, a policeman who could be bribed, to put it bluntly)

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he, of course, knows the importance of what is in his book. Like the policeman who stops the motorist and pulls out his book but has a blank sheet of paper in the book and writes on that blank sheet of paper and then accepts \$10 for not proceeding with the prosecution.

JACOBS, J.A.: I do not know about that at all. All I can see is the perfectly ordinary notes of Inspector Lendrum.

MR. GRUZMAN: Forget about Lendrum, if we may. 10
There is no suggestion that Inspector Lendrum was in any way up to this.

JACOBS, J.A.: And then the notes of Detective Sergeant Wild.

MR. GRUZMAN: Yes, this is anterior. At that time each of them took notes of what the various legal people said, on the 8th, and this was perfectly straightforward. They were just handed the case.

TAYLOR, A-J.A.: Are you saying that Wild would not make any record of interview in his diary, or record of the interview, because there might arise a situation where he would want to destroy it? 20

MR. GRUZMAN: Exactly. That is our submission.

TAYLOR, A-J.A.: Now that I have interrupted you, can you tell me something? You will remember this, when Vojinovic was in the box you tried to lead from him evidence of what he said about Novak down in Melbourne and the learned Judge rejected the evidence after considerable argument. As I understand it, counsel for the defence then cross-examined him as to whether or not he did not allege that Novak had framed him. Was there any arrangement about that? 30

MR. GRUZMAN: No, Mr. Staff just led it for us. Inspector Lendrum's re-examination was another one, and that was not unhelpful. You have to win something.

In answer to your Honour, Mr. Justice Taylor, when Hume was interviewed on the 18th, lo and behold, no notes are put in Wild's notebook about the interview or his denial, and according to Wild not a word was written but according to Hume there was, and those notes have never been produced. 40

JACOBS, J.A.: He certainly wrote notes down on the Sunday.

MR. GRUZMAN: Yes, he did, because Inspector Lendrum was there.

JACOBS, J.A.: But only on loose sheets.

MR. GRUZMAN: Yes. I have been reminded by Mr. Priestley that if it had not suited him to produce them that would have been the end of them. 50

I think I might now hand to your Honours a document which your Honours might find not unhelpful. We are looking for the intrinsic evidence in the document itself to assist your Honours to decide whether it is a fabricated document or a genuine document. In the course of the evidence we cross-examined Mr. Hume and we cross-examined Sergeant Wild as to what took place in the interview and what we have done is to correlate into one document on the left-hand side what actually appears in Exhibit 29, and then what Wild said took place and then what Hume said took place - in their evidence. (Documents produced to Court). Subsequently I will make some submissions to your Honours as to what may be deduced, as to whether Barton was theorising or showing clever anticipation of what could be in the document.

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Exhibit 29 starts off with the question: "Do you know a Yugoslav named Alex Vojinovic?" That is an interesting point. That is what he said, according to Barton's document. (Reads from document). In other words, Barton's version agrees with what Hume said happened. Wild is giving his version, remembering that Wild and Hume are said to be giving evidence of some interview which they say took place on the 18th and here they give answers of what they say took place. (Reads from paras. 1 and 2 of document produced to Court). The reference to the Kellett Club is page 1972, line 15. So when he said he has never been in the Kellett Club, I suggest that is probably not a truthful answer. He must have known about the Kellett Club, who ran it and everything else.

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According to Barton's version the document said "How many times have you seen this man? A. A few times when I was looking for somebody". Wild said that he did not recall that question and answer. Hume said that he did not recall that answer and I said to him, "What were you asked along those lines?" and he said "I don't know really ... yes, I think I was asked that". That in fact was the next question, according to Barton's version - "Q. What do you know about him? A. He was a bad criminal and he hangs around with criminals mostly at the Kellett Club. (Reads para. 4 on page 2 of document just produced to Court). So Barton's version was that he said he was a bad criminal, Wild's version was that he was a criminal and safe-breaker, and Hume's version was that he said "He is a smalltime criminal and associated with small time criminals around the Cross" and that he never said anything about "bad criminals" or the "Kellett Club".

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Then Barton's version is "Q. Have you seen him with Momo? A. Yes, but I told Momo to keep away from him". Just analysing that question at the moment, at that stage Mr. Barton would know nothing about Momo. I do not think he even knew Momo had been engaged - -

TAYLOR, A-J.A.: What do you mean by "at that stage"?

MR. GRUZMAN: This document was prepared before the hearing commenced. Mr. Barton dictated it to his son some time in February or March, between the time of the police subpoenas one day in February.

TAYLOR, A-J.A.: That would be fourteen months after he saw him.

MR. GRUZMAN: Yes, but before the hearing started. In other words, before anything was known about Momo's probation officer, or that he was under the care of Hume or anything like that. Barton had no access to information of any kind.

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MASON, J.A.: Can you give us the reference to this piece of evidence - the preparation of the document? And can you also give us the reference to the page in the transcript where Exhibit 29 got into evidence?

MR. GRUZMAN: The first reference is page 540. It came into evidence at page 558. The first reference was cross-examination.

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TAYLOR, A-J.A.: Page 540 is not cross-examination.

MR. GRUZMAN: Page 543 was the cross-examination and at page 539 he starts the examination in chief. In Mr. Barton's evidence - it was probably sought to cross-examine him about many things, such as character, and there was nothing suggested against him. Probably the worst thing put to him was this: "Is it not the fact that in certain proceedings in Queensland (which related to re-possession of machinery) you swore in cross-examination to the effect that you could remember every conversation you had in the last ten years?" And he said Yes. Whilst he did not come up to that high standard, that is the standard he set for himself. That was in cross-examination.

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TAYLOR, A-J.A.: I notice that he claimed to be a man with an accurate memory yet on the simple test of the interview with Smith he was more or less out - miles out.

MR. GRUZMAN: We will come to that, your Honour. There is possibly a reason for that. I only remind your Honours of this, but it was evidence given months before in another case. What happened was that counsel for the defendant found it in this other case - when this present case was not in contemplation in any way - Mr. Barton had made the simple statement that he could remember every conversation in the last ten years, a remarkable statement which would not be strictly right. But it is certainly the attitude of a pretty honest man who in that case was saying that he was honest and accurate. That is obviously what he was saying. It was not that he was putting forward in this case

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that he had such a tremendous memory. He did not say "I have a bad memory", but he put himself forward as having a very good memory. The significance is that before this case was ever contemplated he put himself before the Court and stood up to the test of saying "I remember every conversation I have had in the last ten years". I don't think your Honours would remember that in your Honours' judicial history before. It is an unusual circumstance and it would take an unusual man to remember this document. That was the standard he set himself a little time before. 10

TAYLOR, A-J.A.: There was cross-examination of the plaintiff at page 327, when you were given leave to re-examine, and you commenced re-examination at page 537. He had mentioned this earlier, at page 55, had he not?

MR. GRUZMAN: Then we were not allowed to tender that document.

TAYLOR, A-J.A.: You gave evidence about it in chief? 20

MR. GRUZMAN: Yes.

MASON, J.A.: Not the contents of it, but you gave evidence about the document?

MR. GRUZMAN: Yes, the existence of it. We were allowed to mention something about it but that was as far as we could go.

JACOBS, J.A.: Then what happened?

MR. GRUZMAN: Then we proved that the document if had existed, had been lost and certainly did not exist. We did that through Anderson, then his Honour allowed secondary evidence of it. 30

JACOBS, J.A.: Why was it evidence at all?

MR. GRUZMAN: On two bases. First of all it was a matter which Barton saw and affected his mind; one of the matters which was in his mind.

MASON, J.A.: That seems to have been an omnibus ground in this case and displaced the ordinary rules.

MR. GRUZMAN: It was probably fortunate for everybody that as much as possible of the truth came out. That was the main basis on which it came in. 40

MASON, J.A.: You had elicited the contents of it as a matter of recollection by Mr. Barton and apparently you rested content with his recollection without endeavouring to tender the document itself and on what appears to have been further cross-examination of the plaintiff by Mr. Staff, Mr. Staff elected to have the document identified by reference to the plaintiff's signature and put it in. I may be incorrect but that is the impression 50

I have from reading the transcript. What occurred from page 537 onwards? Was that re-examination? It was really your recall of the plaintiff and further evidence given by the plaintiff, and cross-examination upon it.

MR. GRUZMAN: Actually the note at the bottom seems to clear that up where it says "Anderson re-examination, plaintiff examined".

JACOBS, J.A.: So the defendant tendered this document which he said was an utter fabrication? 10

TAYLOR, A-J.A.: Page 64 seems to be where he first gave evidence about this: "Detective Follington went to a steel cabinet and took out a brown folder ..." and that was objected to and the answer was struck out. I cannot pick it up at 65 or 66.

MASON, J.A.: You made several desultory efforts to get back to it, Mr. Gruzman. The initial examination of the plaintiff was without any degree of success. 20

TAYLOR, A-J.A.: Would I be right in assuming that the conspiracy had not become apparent even to you at that stage, Mr. Gruzman?

JACOBS, J.A.: So far all that had been done was to call for the statement. It had not been produced, and then secondary evidence was given.

MR. GRUZMAN: I think it is clear from the evidence what happened is these documents were subpoenaed. Mengler was seen by Follington outside the Court on the 12th and 15th February. This case did not start till March. These documents had always been in everybody's mind. We were permitted to call for these documents in February. They were not produced in February. That is when we first became aware they did not exist. That is how it is that between February and March Exhibit 29 was prepared. 30

I remember now Mr. Barton in his cross-examination said that when the document was not produced on the first occasion he still thought it would be produced or may be obtained by the time the trial commenced. That was one of the reasons that he had to consider extremely carefully what he could actually remember of the document because the document might ultimately be produced. This is part of his answers in cross-examination. Page 544, line 23: "Did you ever write down your recollection of the questions and answers you say you saw in this document? A. Yes, I did ...". 40

TAYLOR, A-J.A.: What was the affidavit of 4th January, 1968? 50

MR. GRUZMAN: That was the affidavit setting out the substance.

TAYLOR, A-J.A.: It was not made an exhibit.

MR. GRUZMAN: It did not get into evidence . Your Honours can assume if there had been any discrepancy in it it would have been in. There is evidence that Vojinovic's statement was annexed to it. Nobody thought for a moment that the Hume statement did not exist. "Did you think it was of any importance ... you would assume if it was in police custody it would be all right ... read through the whole document once and some parts two or three times ... I saw Sergeant Wild's name on the document". That is the evidence about the inception of the document. 10

I was taking your Honours to the internal evidence in the document so that your Honours can decide whether it is a made-up document or a genuine document.

TAYLOR, A-J.A.: That is not the point. The point is whether we are satisfied what Barton said the document contained could not have come - 20

MR. GRUZMAN: - out of his mind at that time.

TAYLOR, A-J.A.: At that stage. If it contained matters that would have been known only to Hume or to the police, that would be a strong point.

MR. GRUZMAN: That is the sort of reason why we are inviting your Honours' attention to this.

TAYLOR, A-J.A.: The trouble is what he knew and what he did not know. These events were 14 or 15 months old. The suit started on 18th January, 1968.

MR. GRUZMAN: You can infer from all of the evidence some matters that Barton must have known or might have known and some matters that he could not have known or probably did not know. We are inviting you in looking at what is in the document to draw inferences two ways: as to matters which you come to the conclusion on the evidence he would not really have known at that time - 30

TAYLOR, A-J.A.: He could not have known unless he had seen this document.

MR. GRUZMAN: That is right. And secondly, some matters in a document that you might say to yourself if a man was going to make up a document and he had a difficult case ahead of him, and you assume he is doing it to help a difficult case, would he have put that in the document. 40

Page 544, appears the evidence where Mr. Staff asked the plaintiff in cross-examination if he had written down his recollection. The document is called for by Mr. Staff at page 549, and tendered by him, and signed by Mr. Barton. I think that makes it evidence under s.14B of the Evidence Act. 50

TAYLOR, A-J.A.: That was one of the grounds on which he got it in.

MR. GRUZMAN: Although we are going to seek to use it here for that purpose, it was not tendered in that way. It was only tendered originally as evidence of what was in Mr. Barton's mind.

JACOBS, J.A.: How can it become anything more than that except on credit?

MR. GRUZMAN: Because under s.14B -

JACOBS, J.A.: Which document are you referring to? 10

MR. GRUZMAN: Exhibit 29.

JACOBS, J.A.: That was never in anybody's handwriting or signed by the party to be charged.

MASON, J.A.: It was signed by the plaintiff.

JACOBS, J.A.: It then proves that he says somebody said that somebody else had said these things. That proof is important on his state of mind. How does it ever become evidence of a conspiracy? 20

MR. GRUZMAN: In the events that happened the document was tendered as secondary evidence of a document signed by Hume.

TAYLOR, A-J.A.: It never was secondary evidence of that. Secondary evidence of that would be evidence that a man gave orally in the witness box.

MR. GRUZMAN: There are no degrees of secondary evidence. This was further secondary evidence of the same document, and the signature was sworn to have been signed by Hume. 30

TAYLOR, A-J.A.: I think you might try to get in under s.14B where direct oral evidence of a fact would be admissible. Direct oral evidence that he was shown the statement would be admissible. (S.14B read).

JACOBS, J.A.: Mr. Gruzman, is your submission going to be that s.14B of the Evidence Act, when it refers to a statement signed by a person - that the words "on production of the original document" mean on production of the original document or if you cannot produce it, on production of secondary evidence of its contents? 40

MR. GRUZMAN: Yes.

JACOBS, J.A.: Has it been so decided?

MR. GRUZMAN: May we not develop that argument at this stage?

JACOBS, J.A.: Quite. Not at this stage unless you want to. At a later stage.

MR. GRUZMAN: I understand from Mr. Priestley I tendered a conversation in the first place as secondary evidence.

JACOBS, J.A.: When it was tendered, it was tendered as to Mr. Barton's state of mind.

MR. GRUZMAN: Yes.

JACOBS, J.A.: Then it did not matter whether the original went in or whether he gave oral evidence. Anything of that kind at all was quite irrelevant. He said "I saw this writing". Because of the strict rules he would have to produce the writing. If he cannot produce it, he gives oral evidence of it. Once you go on to something other than Mr. Barton's state of mind then you enter a different field altogether. 10

MR. GRUZMAN: Yes.

JACOBS, J.A.: How did this document ever become evidence of the truth of its contents? 20

TAYLOR, A-J.A.: Mr. Staff cross-examined and asked him did he ever put what he saw in writing.

MR. GRUZMAN: And called for it.

JACOBS, J.A.: It is only relevant on conspiracy if it becomes evidence of the truth of what is in it.

MR. GRUZMAN: We agree. May we make our submissions as to whether it can be said to be evidence of the facts under s.14B at a later stage?

JACOBS, J.A.: Yes. 30

MR. GRUZMAN: If your Honours would like a reference to his Honour's decision permitting the tendering of oral evidence, it is page 538.

TAYLOR, A-J.A.: You were allowed to give oral evidence.

MR. GRUZMAN: Yes. It looks as though it was really on the basis of state of mind at that point of time.

TAYLOR, A-J.A.: His Honour once having ruled, anything that affects his state of mind could be put in evidence. This went in. 40

MR. GRUZMAN: Query whether what he wrote down, which Mr. Staff tendered, falls into the same category.

TAYLOR, A-J.A.: When the witness said "I reduced it to writing" and he was challenged, in re-examination the witness could be asked "Is this the document?"

MR. GRUZMAN: "Have you seen him with Momo?" "Yes but I told Momo to keep away from him". At that point of time whether Barton knew anything about Momo having been employed at Surfers Paradise - I do not think there is any evidence of that. One thing certain is Barton had no knowledge that Momo was under Hume in the sense that the probation officer subsequently gave evidence that Hume had been told in effect to look after Momo.

It is significant that Hume says he told Momo to keep away from Vojinovic, according to Barton's statement. It is a most unusual situation that Hume should have had any control over Momo whatever to advise him in this way. 10

When Wild is asked about it he says that was never said. Subsequently he said "I don't recall having asked him that. Q. It is a question you may have asked? A. I may have but I don't recall. Q. Did he answer 'Yes, but I told Momo to keep away from him'? A. No, there was never any suggestion of him telling Momo what to do, no." 20

Hume said: "I told Momo to keep away from him". Hume says that is a fabrication. What is ultimately proved by the purest chance in evidence in the case, namely that Novak's probation officer had placed him to some extent anyway in the care of Hume so that Hume would naturally have said to the police "I bearing some responsibility for Momo told him to keep away from Vojinovic".

Mr. Barton says that is what was in the original statement. All the evidence suggests that is exactly what he would have said. It was something that Barton could not possibly have known, that there was that special relationship between them. I am not saying that Barton did not know of Novak. 30

TAYLOR, A-J.A.: Are you talking of 5?

MR. GRUZMAN: Yes.

TAYLOR, A-J.A.: 5 is that he told Momo to keep away from Vojinovic. 40

MR. GRUZMAN: In other words he was looking after Momo, saying to keep away from that criminal. This was something that Barton under no circumstances could have known, that Hume bore some responsibility for Momo not associating with criminals. It transpired by the greatest side wind in the evidence because the defence called his probation officer, Gibbons. Here is Barton saying something he could not possibly have known about, which the evidence proves would have been the fact. 50

Here you have Wild and Hume denying that any such conversation took place, and Wild saying there was never any suggestion of him telling Momo

what to do. The whole point of the evidence in the case was that Hume was one man who could tell Momo what to do. This is as significant as anything in the whole document.

No.6: "What is Momo's real name?" "A. Michael Ziric". Wild confirms that. So does Hume. He says he is also known as Michael Novak and also known as Momo. I do not know what the significance of it is, but in Vojinovic's statement he is referred to only as Momo. I do not know that there is any evidence that Mr. Barton knew that Momo's name was Michael Ziric as opposed to Novak or anything else. I do not believe that assertion on that. I do not think there is any evidence or suggestion that he did know. 10

No.7: "Q. Does he have any other name that he uses? A. I don't think so. I would know if he did have". Wild says in his answer to that question: "He only told me his name was Michael Ziric ...". The man's name was also Novak. Here is Mr. Barton saying that strangely enough in this document although he was asked about other names, the name "Novak" never appeared. Wild says that is right. In the interview, although he asked about other names, Hume never gave him the name "Novak". Hume says: "I told him all those names". "He is also known as Michael Novak and also as Momo". It is a remarkable circumstance. If Barton in some way had known who Novak was he would have known all his names. I think "Novak" is the main one used throughout the case. 20 30

TAYLOR, A-J.A.: You said there is no evidence that Barton knew Momo was Novak. That is not the point. The point is: Is there evidence that he did not, that he could only have got it from the document? If you want to rely on this internal evidence you have really to show that the material thing is he had no other source of knowledge.

MR. GRUZMAN: That is true.

TAYLOR, A-J.A.: That is not quite what you have put. 40

MR. GRUZMAN: It is not. This question is interesting for two reasons. I have not put it positively that there is evidence that he did not know the name Michael Ziric. On the other hand I do not think there is any evidence that he did.

If you assume Barton is fabricating the document, you would assume he would find out - and by February 1968 he could have found out - who Vojinovic was. He would certainly have got the names, Vojinovic, Novak and Ziric. Since it was an interview with the police, you would assume that Hume, who knew all this information, would have told the police the three names. Strangely enough Barton swears in the same interview only two names appeared, Momo and Ziric. Strangely 50

again Wild swears that in his interview only the two names were given, whereas Hume swears the three names were given.

There were no notes in existence of what Wild says the interview was. It came out of Wild's head in his examination in the Court that he only received two names from a man who knew three names. There is no way in which Barton could have fabricated that.

TAYLOR, A-J.A.: That depends on a precise recollection of the question and the answer. The whole point of your submission is that he did not leave anything out. 10

MR. GRUZMAN: There was a question: "Did he have any other names?" He says he remembers there was a question. "No. I don't think so. I would know if he did have". Here is a direct question asked by Sergeant Wild of Hume. According to Barton look what he committed himself to. Hume did not give him the name Novak although he knew it. He had no possible way of knowing that. Barton never said he remembered every question and answer. 20

TAYLOR, A-J.A.: You rely on the precise question and the precise answer.

MR. GRUZMAN: Which were not all of them.

TAYLOR, A-J.A.: The ones that are here. It is between that question and that answer that you are making the comparison and asking me to draw an inference. Police officers memorise the whole lot. 30

MR. GRUZMAN: Mr. Staff had the opportunity of saying to Barton, "Here is a document. Read it. Come back tomorrow and let me test you". A man says "I have a wonderful memory". If there is anything easy to test it is a good memory. There could have been 100 tests devised. Nobody was game to test Mr. Barton. I could not to build up his credit. Mr. Staff could. Here is the man who committed himself in the other case: "I can remember every conversation I have had in the last ten years". Whilst it may not be quite accurate, this is the standard he set. Mr. Staff was not game to test him by saying "There is a document. Read it. I will ask you in a week's time". 40

TAYLOR, A-J.A.: Where did he say he could remember every conversation for ten years?

MR. GRUZMAN: It was something outside this case altogether. The fact is he gave his evidence orally and then the document was tendered. You could certainly assume he would know very well the possibility of this document being tendered. It obviously was not a document prepared for tendering. When it was tendered some time later the discrepancies are extremely minor between his 50

oral evidence and the document. At least he was speaking from memory when he gave his oral evidence.

Mr. Armstrong had worked with Mr. Barton at that stage nearly five years. Armstrong and Barton had been associated in business for nearly five years. Armstrong would know pretty well is Barton the sort of man who could remember a thing like that. If he is your managing director and you are the chairman of the company, you would have a pretty fair idea whether the man who was the managing director had a wonderful memory or not. The fact that his memory is never challenged except to build it speaks volumes. 10

No.8: "Q. Have you ever employed or hired Momo? A. Yes, I wanted to help him as a friend and used him many times in my work as a private investigator to help me". That is Exhibit 29. Wild's version: "Have you ever employed or hired Momo? A. Yes. Q. Did he answer that? A. No, not in its entirety. He said he had employed him at Surfers Paradise and had been asked by his probation office to assist him". What was Barton's knowledge of Momo? Barton would have known what Wild said. 20

TAYLOR, A-J.A.: He would have known what Vojinovic had said in his record of interview.

MR. GRUZMAN: Yes.

TAYLOR, A-J.A.: He would have known after the interview at police headquarters that it was Novak who had been doing the following and probably the ringing-up. 30

MR. GRUZMAN: Yes. Look at the way it was framed. "Wanted to help him as a friend and used him many times in my work as a private investigator to help me". The fact is that Hume denied that he had used Novak as a private investigator. He said he was unlicensed.

TAYLOR, A-J.A.: That only proves that Hume is a liar, and that has already been established to everyone's satisfaction.

MR. GRUZMAN: The question we are trying to work out is would Barton fabricate this statement. Barton would not have known that Hume illegally employed him as a private investigator, which means on divorce raids. I do not disagree that Vojinovic had said that Novak was employed by Hume but looking at the document I cannot see it. I can see it says Hume was employed by Armstrong. It does not appear in Vojinovic's statement that the connection between Novak and Hume is stated. I will check it and give your Honour the answer. 40 50

Exhibit 29 says "I wanted to help him as a friend and used him many times in my work as a private investigator to help me". The fact is that Barton would not have known that he had been

used many times as a private investigator. If Barton had been fabricating it, it is more likely that he would have said what Wild swore took place, that he said he had employed him at Surfers Paradise and he had been asked by his probation officer to assist him. He would not have known that. The only occasion that Barton might have known that Novak had been employed by Hume was in connection with Surfers Paradise. Strangely enough he does not say that at all although Wild says that is what took place. 10

When you look at Hume's evidence on the subject he says: "That was never mentioned. I told him exactly how I met Mr. Novak. I also told him how Mr. Gibbons came to me and asked me later on to look after Mr. Novak while he was still at Long Bay, and I promised Mr. Gibbons I would do that. Q. Mr. Hume did you want to help Novak as a friend? A. I wanted to help Mr. Novak because Mr. Gibbons asked me and I believed in Mr. Novak. Of course I wanted to help him, I did in fact help him. Q. Did you use him many times in your work as a private investigator? A. I used him a number of times. I would not say as a private investigator". We proved that was not true because we found the diary entries that described Novak as a private investigator on a divorce raid with him. Then he gave the story that he had been independently employed by Epstein on the raid and there were two of them on the raid but one did not know the other was there. It is unbelievable. 20 30

What appears in the Vojinovic statement on the subject at page 2070 line 25: "A fellow approached me about two weeks ago whom I know from Sydney, but I only know his name as Momo..." Line 40: "What do you know of Frederick Hume ... Momo told me he knows Hume, that they had something to do a long time ago and that is how he knows him". Wherever that came from, it did not come from Vojinovic's statement. It is exactly the opposite of what according to the evidence was in Barton's mind. He knew he had been to Surfers Paradise but he never knew of anything else. All the other work that Novak had done as far as the evidence goes was done against Barton, following him and things like that, without Barton knowing. It came out in the evidence, but Barton did not know about it. 40

I would suggest on each of these matters it is unlikely that Barton would have made that up. 50

I am reminded so far as the Surfers Paradise matter was concerned there was a document, but he was only known there as Novak. Strangely enough Novak is a name that Barton leaves out of this document.

JACOBS, J.A.: Mr. Gruzman, all this we are doing on the basis that you are going to make the

contents of the 11th January document admissible as proof of the facts recounted therein.

MR. GRUZMAN: No, on two bases: (1) Barton's state of mind, and secondly, the basis that your Honour mentioned.

JACOBS, J.A.: We are not concerned with discrepancies in relation to Barton's state of mind. His state of mind has been found in your favour up to the hilt.

MR. GRUZMAN: There is one point, that his Honour was not satisfied of the existence of this document. 10

TAYLOR, A-J.A.: The document of 11th January is Hume's record of interview.

MR. GRUZMAN: Yes.

TAYLOR, A-J.A.: What has been put to you is that you are seeking to establish that as to evidence of the facts stated therein.

MR. GRUZMAN: That is one point.

TAYLOR, A-J.A.: You cannot do that under s.14B.

MR. GRUZMAN: I am not going to raise that argument now if I may. It was originally tendered to show something additional which was in Barton's mind. His Honour was not satisfied on it. It is a matter which may be of some significance. We seek to have your Honours make a different finding on that. 20

MASON, J.A.: Mr. Gruzman, is there any evidence at all identifying the name "Ed. Hume" at the bottom of the document that the plaintiff saw according to him on 11th January as the signature of Hume? 30

MR. GRUZMAN: Yes.

MASON, J.A.: Can you give me a reference to that?

MR. GRUZMAN: Yes, your Honour.

Page 2215 is the account from Hume addressed to Barton at Landmark in respect of the Surfers Paradise matter. Amongst other things it says: "To engaging the services of sub-agent Michael Novak ... at \$4 an hour". Although it is the same man he was known to Barton as Novak, and that is the name which he omits from the document. "Do you know his other names? A. No". Barton knew the name Novak. That is proven. Strangely enough in exactly the same way Sergeant Wild says that Hume did not give the name Novak. Page 2115. Hume may have good reasons for not mentioning the name Novak. Whatever the reasons were, this is fact. If you accept Wild's evidence he never mentioned the name Novak. According to Barton he 40

never mentioned the name Novak. Yet it is proved that Barton knew the name Novak.

May I give your Honour Taylor J. a reference. Volume 1, page 147. In the middle of the page: "Do you recall an occasion on the 16th March 1967 in which you gave evidence in this proceeding ... do you recall in the course of giving your evidence in that matter you said at page 793 of the transcript ... 'yes, and any conversation I had going back the last ten years. I have a very excellent memory. As a matter of fact I am famous for it in Sydney ... I would like to add to it every important conversation". He was never challenged on his memory. He is a man that we can put before your Honours with a fabulous memory. That was in March 1967 long before this case was contemplated. 10

If ever a man could produce this document in this way, this man could.

JACOBS, J.A.: The reason I was asking some questions about this document is it is all right for you to reserve the relevant question. It seems to me at the moment that the findings of Mr. Barton's state of mind being so much in your favour, it is not suggested that he was not in a very frightened state both before and after his alleged seeing of this document - it seems somewhat profitless to spend as much time as you have with this analysis on that aspect. Secondly, an aspect is that the document, if it could be proved to exist, might be admissible under the Evidence Act. That means overcoming the first difficulty of the words "Upon production of the original document". It also means overcoming the difficulty of the document coming within the exact terms, the question of its signature, although Mr. Purvis is quite sure there is evidence on that. Thirdly, we could be doing all this on some sort of credit basis which if you assume the document existed might show a discrepancy between what was alleged to be said in the document by Mr. Hume and what was said in evidence by Sergeant Wild. If we are really doing it on that basis I utter a protest having gone through all that other evidence at this length of time being taken on something which is so hypothetically connected with credit. It is three stages removed as it were. We will adjourn now. 20 30 40

(Further hearing adjourned until 10.15 a.m. Friday, 5th March, 1971).

IN THE SUPREME COURT)
)
OF NEW SOUTH WALES)
)
COURT OF APPEAL)

Term No. 22 of 1969.

CORAM: JACOBS, J.A.
MASON, J.A.
TAYLOR, A-J.A.

BARTON v. ARMSTRONG
ELEVENTH DAY: FRIDAY, 5TH MARCH, 1971

MR. GRUZMAN: I do not propose to take your Honours to s.14B. It seems to us, on our submission, that there is a simpler ground on which the contents of Exhibit 29 are proper to be considered as such. 10

MASON, J.A.: You are not arguing s.14B?

MR. GRUZMAN: Not at this point of time because there seems to be a much easier and more direct ground.

MASON, J.A.: It does not matter the reason, you are not arguing it?

MR. GRUZMAN: No, not at this time.

JACOBS, J.A.: You said "not at this time" very sotto voce. The real question was whether you are going to argue it. 20

MR. GRUZMAN: We would wish to reserve our right to argue it.

MASON, J.A.: When?

MR. GRUZMAN: At some time which is appropriate, your Honour. When your Honours have heard the argument on this and come to the conclusion we would wish, then we might wish or seek to ask leave to argue s.14B if - - 30

MASON, J.A.: You mean if it does not seem to run?

MR. GRUZMAN: It is a difficult argument, your Honour.

MASON, J.A.: I thought that was pointed out to you yesterday with considerable force.

MR. GRUZMAN: Yes, that is why we had to look for another ground.

Reiterating for the moment the way the actual document, Exhibit 29 got into evidence - -

TAYLOR, A-J.A.: I do not understand your problem. It is in evidence. Nobody lodged a ground of appeal saying it should not be in evidence. It is what follows from it. 40

MR. GRUZMAN: Exactly. In Walker v. Walker, 57 C.L.R. 630 - we have asked that the books be brought into your Honours, but that may take some time - it was a husband and wife case and the wife, in the course of giving evidence, made some reference to the husband's income. There was an objection and in the course of evidence she said she had a letter from a solicitor, and her husband's solicitor very foolishly called for that letter and was compelled to put it in. The letter turned out to be from her own solicitor saying that he had made a thorough investigation of the husband who turned out to have a considerable income. 10

JACOBS, J.A.: Was there any dispute about it?

MR. GRUZMAN: There was no evidence. The learned Judge said "... may have been a forgery or the solicitor may have been telling an untruth or the substance may have been incorrect" - in the High Court. It turned out then that the only evidence on which the Magistrate acted was what was in this letter as to the husband's income and Sir John Maitland put it this way: "It was next complained ... letter as to the husband's means". Starke, J. on this point dissented and his view was "It is for the Court to consider the matter in each case ... probative value whatever". Mr. Justice Starke was in the minority of one. Sir Owen Dixon said "You cannot ask for a book of the opposite party and ... he was justified in fixing the sum that he did". Evatt, J. said "The point is important in general practice. Clearly the document was not ...". 20 30

MASON, J.A.: Are you submitting that Exhibit 29 can be used for a wider evidentiary purpose than the oral testimony that the plaintiff gave with respect to his being shown a document made by Hume?

MR. GRUZMAN: Yes.

MASON, J.A.: You say it may be put to a wider use?

MR. GRUZMAN: A wider use, because the oral testimony was - - 40

MASON, J.A.: It was limited to a particular head of evidence, the plaintiff's belief.

MR. GRUZMAN: Yes. It could be said to be self-serving, but it is put in by the defendant and it becomes a different matter.

MASON, J.A.: The fact is that in terms of probative value Exhibit 29 has no weight additional to the plaintiff's oral testimony because it was the plaintiff's recollection that preceded Exhibit 29, which came into existence fourteen days after the matter. 50

MR. GRUZMAN: Yes. The only question is: Is this Court entitled to look at Exhibit 29 as some

evidence, depending on the way the Court considers it and the weight the Court gives it, of the facts contained in it?

TAYLOR, A-J.A.: Of the facts contained in it?

MR. GRUZMAN: Yes, that is what Walker v. Walker says.

JACOBS, J.A.: You raise one of the big differences of view, particularly in New South Wales. I must confess I have always taken the view you have put forward, but there is a strong body of opinion that it is only proof that these things were written or said. I am very conscious of that view, although I have never accepted it myself, in nisi prius cases where policemen's reports and things of that nature are tendered. I have always taken the view that when the policeman's report went in, he was going to be cross-examined on it - but I am very conscious of the fact that there is the other view - - 10

MR. GRUZMAN: With respect, I do not think the other view finds expression judicially. 20

JACOBS, J.A.: It is a very common view.

MR. GRUZMAN: Not where the document is called for and put in by one side and then the other side seeks to use it as evidence. There is room for the view, and indeed it appears to be the fact, that if I tender a self-serving document of this kind it is a different matter.

TAYLOR, A-J.A.: Is this what you are saying it comes down to: "If you reject entirely the existence of the interview of Hume as the oral evidence is given you can still find some evidence of the facts from this document"? 30

MR. GRUZMAN: Yes, I am saying that, because in Walker v. Walker -

JACOBS, J.A.: That is putting the cart before the horse or the chicken in the egg - that kind of situation. What my brother Taylor said was "If you reject the interview, then this provides some evidence of the making of the statement at that time and therefore of the facts contained in it". 40

MR. GRUZMAN: Yes. I want to make my position clear. The question I was asked by his Honour at the adjournment yesterday was "What is the purpose of this inquiry (Exhibit 29)? What use is the Court entitled to make use of Exhibit 29?" I am answering that as a technical matter, but to quote Walker v. Walker - and I will quote two more cases to establish the principle that this document, having been called for by Mr. Staff and tendered by him, it is evidence of the facts contained in it. That of course means evidence subject to such probative value as the tribunal of fact (which 50

here is your Honours) puts on it. As your Honour Mr. Justice Mason said, we know it has no more real value than the original entity, the oral evidence.

TAYLOR, A-J.A.: If that is the position, this is an interesting but academic discussion.

MR. GRUZMAN: Yes, that is true.

I answered your Honour, Mr. Justice Jacobs, and it means it is worth inquiring about and worth going into Exhibit 29 because it, differently from the oral evidence - if you accept the oral evidence - and say "We think this existed" - and now that it is in existence you may look at it and read it all, with the facts set out there, and therefore this is evidence of the facts. When Mr. Barton gave his evidence in chief and said "These were matters within my knowledge and they added to my fears", that is all it meant and that was the end of it.

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But then, when counsel for the defendant called for the document and tendered it, the matter is completely changed. The Court now has in evidence a document, whereas even if the Court accepted Mr. Barton's oral evidence it could not be regarded as evidence of the facts, but in the light of what transpired - Exhibit 29 now being in evidence - it is in fact evidence of the facts.

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JACOBS, J.A.: Provided, of course, it has any real value; and you say "That depends upon whether you accept it was a transcription of the interview of that date". So you are back to the original position.

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MR. GRUZMAN: The only difference is this: The effect of tendering the document is that the oral evidence, even if the Court fully accepted it, would only be evidence that Barton thought these things but, the document being in evidence, it is now evidence of the facts. The interesting thing is that although the conversation was not tendered for that purpose or upon that basis it so happened that in the events that occurred if this document is accepted it provides the missing link which I thought your Honour, Mr. Justice Jacobs, referred to. In other words, if this document is evidence of the facts, then those facts set out in it are that Armstrong, Hume, and Vojinovic were parties to this conspiracy.

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TAYLOR, A-J.A.: When you say "the facts", you do not mean this question and this answer - you mean the statements contained in that document approved as facts by this document?

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MR. GRUZMAN: Yes. That is what the High Court held.

TAYLOR, A-J.A.: If you had Hume's record of interview it would only be evidence that the man

was asked questions and gave answers - but against nobody else.

MR. GRUZMAN: I understand that can be a view but it is not the law. It is not the law anywhere unless the document is self-serving. Assuming in those circumstances there is no law to the effect that it does not provide evidence of the actual facts - -

JACOBS, J.A.: I believe that my brother Taylor's view is a very common view. 10

MR. GRUZMAN: I understand that such a view can exist. It may be thought to be so.

JACOBS, J.A.: More than "can", it is a very common view indeed.

MR. GRUZMAN: It was the view expressed by Starke, J., so it is not a view that could not reasonably be held. But the fact is that Sir Owen Dixon does not hold that view and Evatt, J. did not hold that view. In the case where Starke, J. expressed that view he was in the minority of one, and, what is more important, our researches have shown that there is no case where that view expressed by your Honour, Mr. Justice Taylor, have been held to be the law. Every case we have looked at, apart from self-serving documents, with circumstances similar to this shows the view has been taken that if the document is in evidence it is evidence of the facts contained in the document. 20

TAYLOR, A-J.A.: Because it is put in by the defendant? It comes about in that way? 30

MR. GRUZMAN: Yes.

TAYLOR, A-J.A.: Even though he is forced to put it in.

MR. GRUZMAN: Yes, forced by what he did.

TAYLOR, A-J.A.: Forced in the light of procedure and the laws of evidence.

MR. GRUZMAN: Yes, and I suppose Walker v. Walker is the classic case because it was really the only evidence that justified the Magistrate's finding.

MASON, J.A.: Where you cross-examine a witness on a document from which he may have refreshed his recollection the usual result is that you are forced to put the document in, and there is a passage in Taylor and also one in Best, I think, which makes it clear that it goes in then for all purposes, but if there is any completely irrelevant matter in it the Judge should exclude it. 40

MR. GRUZMAN: I think that is explained by Sir Owen Dixon who said the document might have anything in it but if it is irrelevant he does not say you 50

exclude it, but disregard it. It is the same thing. It obviously does not help the case one way or the other, but anything that is in it and does help is evidence of those facts.

Then there is Hume v. Monro, another decision of the High Court, 67 C.L.R. 461. The facts do not matter very much. It was a case where relief was sought in Equity in New South Wales. (Reads headnote). In the course of proving the case the defendant company tendered a document which was a consent release. Incidentally, at page 486 in the judgment of Williams, J. it was said that there was no other evidence "that Thomas Small ... under the will". In other words, certain relevant facts are referred to in that document but there is no other evidence of it. His Honour said "The document having become part of the evidence ... request". So again the same principal is applied. The document having got into evidence was evidence of some facts quite apart from the purpose for which it was tendered.

In Stunzi and Sons Limited v. The House of Youth Pty. Limited, 1960 S.R., 220, a decision of the Full Court (Owen, Brereton and Collins, J.J.) Walker v. Walker was applied. It was a joint judgment. At page 225 "In the second place even if it had been necessary for the plaintiff to perhaps tender ... we agree with his Honour's view". There is no need to go through the reasoning by which the Court infers from the letter that these facts existed.

Exhibit 29, being in evidence, is evidence of the facts set out in the document. The weight to be given to that evidence of course is entirely a matter for the tribunal. In this case we would not be submitting otherwise than that the weight given to this document would be exactly the same, no more or less, than the weight given to the oral evidence. But if weight is given to the oral evidence, the fact that the document itself is in evidence means it is evidence of the facts.

In McLennon v. Taylor, 81 W.N. (Part 1) page 525, a decision of the Court of Appeal, Mr. Webb appeared for the plaintiff and Mr. Ash for the defendant and Mr. Webb's client had given evidence that the defendant had admitted that he was the driver on the 27th of the month. In the course of cross-examination there was much reference made to the statement the defendant made on the 29th of the month where he apparently said the opposite. The plaintiff's case closed and Mr. Ash for the defendant sought to tender his own client's statement. I mention the names of counsel - you will see why in a moment - and Mr. Webb told the Court that he did not object to that document because he thought it was an advantage to have the last address. Therefore he did not object to the document and in those circumstances Mr. Ash put the document in.

TAYLOR, A-J.A.: He did not object to the tender?

MR. GRUZMAN: That is right, he did not object to the tender by the defendant because it meant that Mr. Webb got the last address. So the defendant gets the document in in this way and then seeks to rely upon it. The Court said "This is a self-serving document which you had tendered. Therefore you cannot rely on it and Walker v. Walker does not apply". I put this just to show the obverse of the argument. So, it was distinguished from Walker v. Walker only because the party who sought to rely on it was the party who tendered it. That is why I say it is the obverse of this case. We seek to rely on a document tendered by the other side. 10

JACOBS, J.A.: To me your great difficulty, as I did mention, is that whereas in Walker v. Walker the statement by the solicitor could be given such weight as appeared from all the circumstances - it not being known why a solicitor should make a direct statement as to the means of the party without some knowledge and responsibility. In the present case we know what this document was: it was a recitation by the plaintiff of facts that he knew nothing about. 20

MR. GRUZMAN: It was a recitation of what he said was in the statement. But it does not seem to matter, if one looks at all the cases, what the document was.

JACOBS, J.A.: I think you are missing what I am saying. In Walker v. Walker it was conceivably open to the magistrate, and the High Court said that he took the view that a solicitor would not be making a statement on means of this kind in a letter except in a responsible manner. Therefore it should be given that degree of weight. That is what lay behind giving it any weight at all. But this might have been Mr. Barton saying "I found a piece of paper in the street but lost it and then I dictated to my son its contents". It would be true that he located it, but so far as the weight of it in relation to facts only is concerned, it would be nil because it was a piece of paper drifting in the street. 30 40

MR. GRUZMAN: Mr. Barton said "Mr. Armstrong, says Mr. Hume, told him so-and-so." Firstly, as to Mr. Armstrong, it would be most positive evidence of admissions. As to Mr. Hume, it would depend. Prima facie it would not be admissible but if it was in evidence it has to be given such weight as the Court sees fit. 50

JACOBS, J.A.: That is precisely my point.

MR. GRUZMAN: In this document is sworn to be what Hume said. That is sworn to be Hume's statement, that is evidence. Now, admittedly the Court has to decide whether that swearing is true, but on the

assumption that the Court accepts that you are not dealing with Barton's assertion but dealing with what Hume said, and that is the significance of it. It is not the Barton statement, it is the Hume statement.

JACOBS, J.A.: No, it is the Barton statement.

MR. GRUZMAN: Supposing the Court in the process of reasoning happens to say "We believe Mr. Barton on this". That is the first step over. "We now say that is what Hume said because we believe it is what Hume said because it has been found to our satisfaction that Hume said this". The Hume statement is now in evidence and "we can give it whatever probative value we see fit". 10

JACOBS, J.A.: You may be right, but I think not.

MR. GRUZMAN: Also, there does not seem to be any authority that we have found which says that because the document is of limited or possibly no value it cannot provide evidence of the facts. There does not seem to be any line of authority which says it has to be a document which is capable of having probative value. Indeed, the authorities seem to go the other way. As your Honour, Mr. Justice Taylor, said, if there is something in the document which has nothing to do with the case, you exclude it. But there does not seem to be any line of authority which says it has to be a document of which the maker has any personal knowledge or anything of that kind. 20

JACOBS, J.A.: What I said was that for all we know of the circumstances in Walker's case they did entitle the Magistrate to say "This has some probative value", having been stated in a letter, but when you see what this statement is - it is what Barton said that he saw in another document and once you get that far removed you are one step further than anything possible in Walker v. Walker. 30

MR. GRUZMAN: That is true. But supposing the Court said "We regard this document as a truthful document" - truthful in the sense that it is what Barton saw; then it is no different at all to the position where Hume's statement had been given before. 40

JACOBS, J.A.: It does not carry us anywhere on whether it may be truthful or what Hume said was truthful.

MR. GRUZMAN: That is the next point. Hume may have told a pack of lies and, indeed, we must say that we do not accept a lot of what Hume said in that document but that, we have submitted, is not to the point. The first question in the process of reasoning would be: "Do we regard this as Hume's statement, a statement proved to our satisfaction to have been originally made by Hume?" That is the first point. Then we look at it as something that Hume said and evidence of the facts as Hume 50

related them. That is in the same way as the solicitor's evidence in the form of the letter is evidence of the facts as that solicitor related them. As Evatt, J. said "The document might have been a forgery or the solicitor in question might have been not telling the truth in his report, the important substance of his report may have been wrong". In other words, the solicitor might have made an honest mistake apart from anything else. One does not know the source of information he might have had. He might have just phoned some office and said "Have you got John Smith working there? What is he earning?" 10

JACOBS, J.A.: If he had said that in his report then the conclusion would perhaps have been different.

MR. GRUZMAN: If one thinks of what Walker's case means; there may have been misunderstanding as to who he was talking about. There is no record to show, or anything like that. The only evidence is the letter, where he said that he made some inquiries. They may have been made of the man in the street. 20

JACOBS, J.A.: If he had said "I inquired of a man in the street and was told that this man's earnings were so much", do you think or say that the man in the street - giving that information - means that the Court could have given any probative value to that? Do you?

MR. GRUZMAN: Obviously the amount of probative value would be practically nil. 30

TAYLOR, A-J.A.: Why do you insert the word "practically"?

MR. GRUZMAN: Why? Because it might be common ground. Everybody in the area may have known that he was the richest man in the village or town, if he had that reputation, and if he had asked a man in the street, then the information might have been of some value in the case, or, of course, it might have none. The only point I am making is that in each case once a document is in it is capable of and has the ability to be evidence of the facts. 40

JACOBS, J.A.: All things being equal. This is the point - other things being equal. That is, that it has not within itself the seeds of the destruction of its probative value.

MR. GRUZMAN: No, your Honour.

JACOBS, J.A.: That may be the difference.

MR. GRUZMAN: I appreciate the difference. Our submission is, and I am taking the words out of the judgment, that once a document has gone in then it is capable of being evidence of the facts. 50

Now, the extent, the quantum, as it were, of evidence which it will provide can come from proof beyond reasonable doubt; it can go from that to nothing. So in this particular case the Court is entitled to say, first of all, it is a statement by Hume and - let us assume the Court has gone the first step and accepted Barton's evidence on it - the next step is to show it is a statement by Hume - "It is a statement by Hume, what relevance can we place on what Hume says?" etc. And the Court will, by process of reasoning, say "To what extent do we accept this document as evidence of the facts?" we will be making some submissions as to the extent to which it should be accepted after I have been through the document. 10

JACOBS, J.A.: You were going to give us the reference to the identification of the document.

MR. GRUZMAN: Page 549. This is not quite on your Honour's point but I will come back to that, if I may. At line 13 "Mr. Staff: I call for the document typed by Mr. Barton's son". I am recorded as saying at line 29: "I produced the document. I have written something on it ...". Of course we had no idea that the document would find its way into evidence. It is not proffered in any way as a document. 20

At page 558, Mr. Barton said that he dictated it to his son and handed it to Mr. Moore, solicitor in the matter, on the Tuesday. (Reads from line 38). At page 75, line 38, "Do you recognise any of the handwriting ... it was all over the page". At page 541: "Will you tell us what the words were that you saw written in handwriting ... you recognised the handwriting? A. Yes". 30

He was cross-examined on that also at page 543, line 33, where he repeats his evidence on this handwriting.

MASON, J.A.: At an earlier stage, just before page 543, in chief you had asked him a question "In whose handwriting was the signature?" which was objected to and the question was rejected. 40

MR. GRUZMAN: Yes. It was clear and that is why we do refer to the number of passages that identify that matter.

MASON, J.A.: Everyone seems to have overlooked that at an earlier stage of the case you had asked the question and got the answer.

MR. GRUZMAN: Yes, that is true. And of course there was the cross-examination which cleared it up.

MASON, J.A.: Cleared it up? 50

TAYLOR, A-J.A.: I thought that meant you got evidence from him that what was written there was the words "Frederick Hume" but you did not at

that stage get evidence that it was written by Frederick Hume; that came later.

MR. GRUZMAN: Yes.

At page 75 I said "Did you recognise any of the handwriting ... Frederick Hume". It was the same argument - there was only one document - "Did the handwriting you referred to ... over the page". It had been proved in the beginning and it resurrected itself later on and there was examination and cross-examination on it.

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TAYLOR, A-J.A.: He was shown the document, the account, F. Hume, and then cross-examination was directed to show that the record of interview had "Frederick Hume" and not "F. Hume".

MR. GRUZMAN: Yes. There is no doubt that there was evidence that this document was signed by Frederick Hume. At page 76 the document was identified as a record of interview of Hume taken by Detective Sergeant Wild at the C.I.B.

I am now going to refer again to the document which extracts the various pieces of evidence of Exhibit 29. The preceding one which was dealt with was No. 8.

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"Q. Have you ever employed or hired ..." we have submitted that that is nothing Barton could have made up even if he had been inclined to. According to the exhibit: "What do you mean by help you? A. You know, little simple things, following people and reporting to me". Wild says that nothing like that was said and Hume says that nothing like that was said. On the contrary it appears to have been the fact that that is exactly what Novak was doing for Hume. In other words, if Barton had known what the evidence was going to be in the case, or anyone knowing what the evidence was in the case, it would be said "If Hume was asked: What do you mean by helping you?" he would have answered "You know, little simple things; following people and reporting to me". But both deny the question was asked.

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Exhibit 29 says "Can you find Momo in a hurry for us? A. Yes, I can bring him here within 24 hours". We know of the special relationship, the probation type of relationship, between them. That is probably the fact, and we know that in fact that was the method adopted by the police to get him. We know that from the evidence in the case. The method adopted by the police to get Momo or Ziric was to get Hume to get him.

Wild says that that was not what was said but he said "I will get him to contact you". Hume says in answer to the question "No, no policeman would ask a question like that. I would say 'Go and find him yourself', if he asked me a question like that ... no, I did not".

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It is only a small indication but it is unlikely that Barton could guess the answer to that question which turned out, in the event, to be so accurate while the others are saying that did not or could not occur.

"Do you know Alexander Barton of Landmark Corporation? A. Yes. I did a job for him at Surfers' Paradise."

Wild says that that is exactly what was said. Hume says "Yes, of course I was asked that but the answer was 'Yes, I did a job for him at Surfers' Paradise ... I would not have mentioned it'". In the affidavit which turned up subsequently in the case there is no possibility of Mr. Barton having known anything about Hume saying that he worked for Barton. If Barton was making up this document, and since this was bound to have some presentation in the case, he would have said that Hume described himself as working for Armstrong, when that was one of the things we were trying to prove. Instead of that the document says that Hume said he was working for Barton. I will show exactly what Hume said in his affidavit which was produced months later. 10 20

Q. 12: "What kind of a job? A. Mr. Barton and Mr. Armstrong's company had a problem with a contractor and I was hired by Mr. Barton to take possession of some machinery". Wild said that something like that was said and Hume says that something like that was said. He said "No, I would not have gone so far into the details, I think. I just told them briefly what happened ... that is all. I went over there and re-possessed the machinery". Exhibit 29 shows Hume as saying "I worked for Barton" and his affidavit produced a month later said the same thing, the emphasis being there. 30

" ... is that Mr. Alexander Armstrong, the M.L.C.? A. Yes". Wild said that he said "Yes, I know him socially. I play tennis with him". Hume's answer: "I would not know whether he was. I only learned this ... I do not know what M.L.C." That carries us nowhere. 40

The next one your Honours may think is significant is "How well do you know him?" Barton's version says that Hume said "He is my friend and my best client". Wild denies that that was said and Hume positively denies it. This is one place where you get a positive denial of something that was in the statement, both by Hume and Wild. The statement is that Hume said "Armstrong was my friend and my best client". There is no suggestion that Barton would have in any possibly conceivable way known that Armstrong was Hume's best client. 50

TAYLOR, A-J.A.: It would be to his advantage to say so in the record of interview - that is the case.

MR. GRUZMAN: Yes, it would be to his advantage but how would he possibly know?

TAYLOR, A-J.A.: He would not have to know if he was making it up.

MR. GRUZMAN: That is true, but what happens when you get to the facts? He could say anything. He could say "Armstrong said to me" - anything, if he is making it up. The only problem is that if there is something in this document which Hume is alleged to have said, which turns out to be outrageously wrong and impossible wherever you can check it against the facts, that would throw doubts on the document. On the other hand if you found not one but a number of things in the document as to which Barton had no way of knowing, and which he said - -

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TAYLOR, A-J.A.: He did have a way of knowing; he had known Armstrong for years and he knew that Armstrong was no stranger to Hume, they spent a lot of time together and played tennis together every other day - he would know that. I do not think there is much in this point. It is a matter for you. You have got better things to talk about than this.

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MR. GRUZMAN: No. I would like to go through this. First of all there was a matter that was proved up to the hilt, but things that made Armstrong Hume's best clients were matters done in complete secrecy and as to which Barton knew nothing. There is no suggestion - he was cross-examined on these points and some points were made of this, and the other matter is that if there could have been any evidence adduced about these matters in cross-examination there would have been, but no-one was called in respect of them. The only fact which emerged was when we got hold of Hume's cash book and went through it and analysed it, it was proved up to the hilt that Armstrong was Hume's best client. Barton says that Hume told the truth about it at the time when Barton could not know the truth of it. Wild and Hume both denied that anything like that was said. Each point in itself is not an earth-shattering point, but it is when you go through the whole lot and then say to yourself "Really and truly, even if a man was desirous of doing a thing like that, could he really have done it in this way?" It is in that context that you look at these various points.

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"Q. What do you mean by he is my friend?
A... I am with him a lot socially and play tennis with him". Fair enough. I suppose someone who knew him would know him and, indeed, Wild says that is what was said exactly - "He told me that he knew him socially and played tennis with him". Hume said that he never said that he knew him socially.

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"Q. How often did you see him? A. Two or

three times a week when he is in Sydney". Wild says it is not true. Hume says it is true. Two or three times! I suppose you could say that is something that Barton could have known.

"Q. What do you mean by he is my best client? A. He gives me a lot of investigating to do and I earn good money from him".

Wild denies that anything like that was said. We know that that is not a truthful answer by Wild. In other words, nobody would believe that when he was investigating this matter he would not have asked Hume a question like that or that Hume had any reason for denying it. 10

"Q. What do you mean by good money? A. I always give him big bills and he always pays". Wild said that he never asked anything like that and Hume said he was never asked anything like that. But they are the facts, they are the facts which - apart from one matter - were not within Barton's knowledge at all but which were subsequently proved in evidence. 20

"Q. How much money have you got from him lately? A. I don't remember. It was not much". Wild said he never asked him such a question. Hume, on the other hand, said "... I told him and I was paid. I told him I was paid by the company ... got paid for it". Wild denied that he asked any question like that. "Were you asked how much money? A. No. I was never asked that question". Obviously Exhibit 29 is the more accurate version of what took place and again it is something that Barton is unlikely to have made up. 30

If Barton believed that Hume was paying Vojinovic to follow him, I suppose the last thing he would have invented would be Hume saying "Not much, I don't remember, but not much".

"Q. Allegations have been made that Alexander Armstrong hired you to employ criminals to kill Alexander Barton ... these are very serious allegations. What do you say to that? A. I hired Momo and his friend to follow Mr. Barton and if the opportunity arose just to do him over a bit, you know, to frighten him, and tell him that there was more to come". Both Hume and Wild say that the question was asked but denied. 40

TAYLOR, A-J.A.: Wild did not say that the question was asked, he said "words to that effect".

MR. GRUZMAN: Yes. I am paraphrasing it. In substance the question was asked but denied. One would have thought that if this was invented that he would have said that he hired Vojinovic. 50

"Q. What friend of Momo do you mean? A. Alex; you just showed me his photograph." Wild says "No, that did not happen" and so does Hume.

The other questions in Exhibit 29 were put to Wild and Hume and they said nothing like it took place.

What I have read to your Honours there was where I put each specific question and answer to each of the two witnesses and extracted the evidence. There follows some matters which fall out in evidence that might bear on the validity of the document. The significance of the first one is this, that in Hume's diary for 17th January the name Vojinovic appears in big letters and then when he was telephoned from Melbourne to say Vojinovic had stolen his car. It is a matter not without significance that on 17th he knew Vojinovic by name. This is certain, and he had written it down in his own diary, on the desk pad, and he knew that Vojinovic had stolen his car. According to Wild the interview took place on 18th January. But he knew on 17th January and wrote in his own diary pad the name Vojinovic because he was telephoned from Melbourne and was told that this man named Vojinovic "has stolen your car". So there is no doubt at all on his evidence, if you accepted it, that on the date that he went to see Wild (which was 18th January) he knew Vojinovic by name as the man who had stolen his car. Of course, Barton could have known nothing at all about any of this.

So Exhibit 29 says "Do you know a Yugoslav named Alexander Vojinovic? A. No". Certainly from the 17th onwards he did. That is a fact and it is proved from his own document and from other evidence. There is no doubt that on the 17th he was told the name Vojinovic. "Q, At that time, Mr. Hume, you were unaware of Mr. Vojinovic's name? A. I was unaware on that date when I was being interviewed by Sergeant Wild". (Page 1886, line 23). "I was unaware on that date but when he showed me the photograph then I knew ... written up on 17th January". He said that the man Vojinovic took the car from Novak in Melbourne and "Then he rang me up a few days later and said the car was recovered ... to come to Melbourne to give evidence". When we came to deal with the diary we will show it was written in his diary for the 17th.

These are just references to the evidence. "Q. You have just stated to his Honour that when you were interviewed by Sergeant Wild you were unaware of Vojinovic's name? A. Until he showed me the photograph, and then he told me the name ... A. When he showed me the photograph I certainly recognised the man as the one I had seen at the Cross".

I am trying to not over-emphasise particular points, but we have to take them all together, and here is one where, at any rate, it is not necessary to proceed further into the evidence to prove that on the 17th he knew Vojinovic by name but prior to the 17th he may well have denied he knew him by

name. However, after the 17th he had been told by the police from Victoria, and he could not deny it.

TAYLOR, A-J.A.: What do you mean by "he could not deny it"? Hume could have said anything.

MR. GRUZMAN: That is true. You cannot place 100 percent store on anything, and when you put it all together here is one bit that appears to be on the surface unanswerable - in his own diary it shows the 17th. He could not have forgotten it by the next day. There was a police message to him giving the name Vojinovic, so he would be careful about denying it the following day when talking to more police. Yet he denied it on the following day, according to him - strongly suggesting that the interview took place before the 17th. 10

On the "bad criminal" business - "Is it true to your knowledge that he was ... small time criminals". Then you remember that it turned out that to his knowledge he tried to blow up a safe, and various matters, and he has a real record. So to describe him as a bad criminal is probably not far out. 20

The last answer is simply "He was known to me".

On this point - "I used him many times ..." helping to do little simple things such as following people and ringing him - these are supposed to be Hume's words. The evidence was "Nearly every time he came to Sydney ... a few little jobs to do". Is not that language, just flowing from Hume, which appears on Barton's version of what Barton says Hume said? Here it is, flowing out of Hume in his evidence. Barton could have no possible way of knowing that was a description of Novak. "I give him little jobs to do ... by the client". Then it goes on "Were you actively ... he was actively working for me". 30

This is not a case of counsel putting a phrase to him. These are words flowing freely from Hume, his uninhibited language which finds its expression in this document which Barton says recorded his answers. It is an interesting and somewhat persuasive aspect of the matter. 40

"When did you start to employ Ziric or Novak to do work for you? A. I would not know ... he knows something about following people". Then "friend and best client", and Follington asked him another question "How friendly are you with Mr. Armstrong?" which is something different from what he said previously. 50

On the "best client" - I do not want to take your Honours through the cash book which your Honours have been referred to and your Honours are obviously familiar with the point. "I am asking

you will you agree that according to your ... after all got the job for me to do". It is pretty amazing that Barton could guess - we all know what little credit, perhaps, can be given to Hume's books because he had to have certain money going through his books - Barton would not know anything about that and here is Barton saying that Hume told the police that "Armstrong is my best client".

TAYLOR, A-J.A.: You did not after this document was put in evidence put Barton in the box and go through these matters to ask him what he knew and what he did not. There is no evidence about it. 10

MR. GRUZMAN: I do not know that I would have even been allowed to. It was a wonderful field for cross-examination.

TAYLOR, A-J.A.: If it was suggested the document was a fabrication and he had never seen the other document and it did contain internal matters that he could not have known of, he was entitled to prove that. 20

MR. GRUZMAN: Frankly I doubt it. He had never been attacked on it.

TAYLOR, A-J.A.: He had been attacked on whether or not he had ever seen Hume's record of interview.

MR. GRUZMAN: There was no doubt he was attacked on the document.

TAYLOR, A-J.A.: It was suggested (a) he did not have a recollection, and (b) it never existed. If there was in the document that he reconstructed facts that he could not have known, you would have been entitled to prove that. 30

MR. GRUZMAN: I must confess I am not sure. Whether I had a right to prove his credit, which is what it amounted to, affirmatively - frankly I believe I cannot. Whether that be so or not, counsel for the defendant had a wonderful field. Barton had sworn these were there. Counsel could say "You could have known this from here, and that from there, and you could have made up that document".

TAYLOR, A-J.A.: I only wanted to know when you say Barton could not have known this, that is something you say we should infer from the evidence. 40

MR. GRUZMAN: Yes.

TAYLOR, A-J.A.: There is no specific statement?

MR. GRUZMAN: That is right. Supposing Barton had said "I did not know what was in Hume's cash book".

TAYLOR, A-J.A.: You would not have to put him back to prove that.

MR. GRUZMAN: This is the very point we are discussing.

What you have to consider on the cash question - it is not only a case of what Hume was getting from Armstrong. It is a case of what his books would show.

TAYLOR, A-J.A.: You mean it is a bit like the iceberg.

MR. GRUZMAN: Yes. Hume obviously in a statement to the police would have said what his books revealed. He would not say "I have got a lot of money in cash". Here is Barton making up, as it were, what was in Hume's books of account. It is according to them that Armstrong was Hume's best client. That was proved up to the hilt. Really there is no conceivable way. 10

TAYLOR, A-J.A.: I thought you established pretty well he was his best and only client according to the books.

MR. GRUZMAN: That is true. One cannot put tremendous store on this point. There is yet another which is completely unexplainable except on the basis that Barton is telling the truth. 20

I accept the criticism that Barton would have known something about his relations with Hume. One might recollect in Barton's favour this, that it is undisputed that as late as June or July 1966 Barton had never heard of Hume. For the first time the fact of his existence was revealed.

TAYLOR, A-J.A.: You mean at Surfers Paradise?

MR. GRUZMAN: Yes. Your Honour referred to the fact that Barton had known Armstrong for years. 30

TAYLOR, A-J.A.; He had visited his home.

MR. GRUZMAN: Only on two or three occasions. It is common ground that up to June or July 1966 Barton had never heard of Hume let alone any relationship between Hume and Armstrong. In those circumstances he was only introduced to him as a man who did his dirty work, a private inquiry agent who did Armstrong's dirty work. As far as I know there is not a tittle of evidence to suggest that Barton was aware of the close social relationship between Hume and Armstrong. 40

Whilst I accept that it could be said he would have known, it could only have been in the last six months. Each point is not a world beater in itself. It just cannot be. But all put together they seem to help.

Then we come to the jewellery matter. According to Hume he was asked a number of things about Armstrong. According to Barton there was the virtually incredible statement "Here is a member of Parliament dealing in stolen jewellery, keeping it in his home". Assuming he is fabricating 50

a document, why on earth Barton would want to complicate anything by putting such outrageous statements in the document as coming from Hume's mouth is absolutely beyond belief if he is trying to give the document some credence.

We know from independent evidence out of Follington's mouth that before the existence or non-existence of this document had ever become an issue of any kind, before it was ever known that the document did not exist, here is Barton's solicitor and Follington discussing the stolen jewellery in Armstrong's home, and in the context of the custody of the documents. I suppose that is as cogent a proof as one could get from an unexpected source, that Barton had this information about stolen jewellery in Armstrong's home. 10

The next little pointer is this. There even appears in this document a sketch by Hume of where he says the stolen jewellery is.

TAYLOR, A-J.A.: There appears a sketch by Barton of what he says is a reproduction of the sketch by Hume. 20

MR. GRUZMAN: Barton swears in Hume's statement there is a sketch. It is an unusual trait that somebody - some people are free with a pen and prefer to draw rather than describe. That is the significance of what happened in the course of cross-examination. Unrelated to this, Hume in the course of cross-examination on an entirely divorced matter said - first of all he was asked "Whereabouts in the hotel motel were you in the rooms when you signed the document? A. The front of the building is where the office is ... I can draw it if necessary". In the witness box he volunteers a sketch on that matter. Subsequently in relation to his gun. Again it is not suggested to him. "I can even draw it for you if it helps you". That was in the course of cross-examination he volunteered to make a drawing, twice. Barton has committed himself to the fact that this man volunteered a drawing in his record of interview. 30 40

It is not conclusive, but when one takes the whole of the points in this case, the whole of the evidence, first of all remembering the broad facts that Barton was found by his Honour to be honest though mistaken in parts, but on the other hand Hume nobody would accept, Wild and Follington on nobody would accept, and all the surrounding circumstances, we submit your Honours will find that this document existed and was seen by Barton in the way he said. 50

I suppose one of the salutary things is Barton's memory which if it had been proffered in this case might have caused some doubts, but when it had been proffered in an entirely different case, twelve months before, it must carry conviction that he indeed was a man with a good memory. I would

would suggest it should carry conviction that he is an honest man too because we all know that dishonest witnesses usually claim bad memories as excuses. It is only a man who really is going to try and tell the truth in whichever case he happens to be in, who proclaims himself in loud terms as a witness with a good memory.

We propose to hand up to your Honours a document at some stage. Although Barton made mistakes in his evidence, he also was pretty right on a lot of things. We are going to extract some of the matters where he had a pretty clear recollection: company meetings and matters of that kind, complicated things over a period of years. Subsequently when the minutes or other documents were turned up he was found to be substantially right. In other words he is a man with a pretty good memory, of which he is probably unduly proud, but nevertheless it is not bad. 10

If you take his evidence as a whole in this case and compare it with known facts from documents you come to the conclusion that here is a man who has demonstrated his good memory. Then again the fact that counsel for Mr. Armstrong, Mr. Armstrong having worked with him for years, never suggested to him that he did not have a most excellent memory, and never put him to the test as one could have done. 20

On the evidence, remarkable though it may be, we submit that it carries conviction that this document existed. 30

There are other matters in the document which your Honours will look at which will perhaps throw a further guidance to it. The case for the plaintiff before his Honour Street J. was that the object and purpose of the pressure was to procure the execution of a certain agreement. It was because his Honour was not satisfied on that point that his Honour found against the plaintiff.

TAYLOR, A-J.A.: You said the case was that the object of pressure was to secure the execution of the agreement. What his Honour found was that the pressure was there but it did not either produce the agreement or have any material effect. 40

MR. GRUZMAN: Basically the statement of claim was duress, and duress intended to a particular conduct. At that point of time taken from Barton's point of view he would have said to himself "I have got to prove that Armstrong pressured me into signing this document and not just pure malevolence or something of that kind". 50

In Exhibit 29 the question appears: "Why did Mr. Armstrong want to harm Mr. Barton in the way you have admitted?" If Barton was making that up he would have said "He was trying to get me to sign the agreement or buy shares or something of

that kind". "A. Mr. Armstrong was chairman of a big company and Mr. Barton pushed him out ... Armstrong wanted to get even with him and get his position back". This does not help Barton's case.

TAYLOR, A-J.A.: The thing I do not follow is what you are getting from all this. The significance of this exhibit in the first place, if it is admissible - it went to an issue I suppose. If Barton read this document and it contained in it admissions by Hume that he was acting contrary to his interest, it could go to the issue of whether or not it affected his mind. The real importance of it from Barton's point of view was that this was the second time it contained matter that brought Armstrong into it. I would not have thought from the point of view of Barton's case anything in this document, except that Hume employed Novak and tied Hume back to Armstrong - those are the important things. 10

MR. GRUZMAN: I agree entirely. 20

TAYLOR, A-J.A.: I do not quite see what comfort you get. Looking at it from the point of view of a document that he could have made up, I think the only important things are what was the purpose of it. If you look at it from that point of view the important things to put in the document are things that tied him to Armstrong.

MR. GRUZMAN: That is true. Indeed it is what I am going to say now. I am going to say if the document is in evidence what use can be made of it. What does it prove? Three things you can use against me in effect. I suppose the first and most important point is to look at all the circumstances of the case. You cannot take this in vacuo. You have to look at everything. You have to look at Armstrong's character, Armstrong's declarations of what he could have done. You have to look at the likelihood that the document existed. You have to examine Wild and Follington's evidence and their protestations the document did not exist. You have to look at the regularity of the investigation to say was it likely if the matter were properly investigated the document would have existed. You have to look at the fact the police told a pack of lies to try to explain why they did not do something which, if the document existed, they did do, and so on. It is only in the light of those circumstances that you come to a conclusion: Is it more likely than not that this interview took place at that time? Is it more likely than not that there was a record of interview taken? Is it on the evidence more likely than not that Barton would have shown it to Follington? Is it more likely than not that he could have remembered it and reproduced it in the way that he did? You will be taking into account doubtless the fact that strangely enough he was handed Vojinovic's document. You will take into account that Follington showed the document to Barton without the knowledge of 30 40 50

Wild so that one thing Wild did not count on was what from his point of view was the crass stupidity of Follington in showing this document to Barton. You take into account what happened with Vojinovic. In other words you cannot look at the document in isolation. That is why I sought to invite your Honour's attention to the whole of the evidence so that you can look at this document in the light of the whole of the evidence.

First of all look at the likelihood or otherwise of the document existing. Then make a critical examination of the credit of the police concerned and see what conclusion you come to on that. Then look at the document and see what conclusion you come to on that. We submit that looked at in that way no other conclusion is reasonably possible. There was a record of interview of Hume and this is a version of it. 10

If that is so then it is permissible to look at it in the light of the events that happened to see what assistance it is to the case. So regarded you can put it in a nutshell. It supplies the missing link which his Honour Jacobs J. referred to in a very early stage of this case. In other words it ties it directly back to Armstrong. 20

JACOBS, J.A.: Because Barton said that Hume said that Armstrong employed him.

MR. GRUZMAN: No your Honour, not for that reason. It is because there was admitted into evidence a document established to the satisfaction of the Court to be a statement by Hume in which Hume said that Armstrong employed him. Tendered by Armstrong. 30

TAYLOR, A-J.A.: You mean as evidence of the fact.

MR. GRUZMAN: Evidence of the fact. I know that opinions may properly differ on it. I can only submit the law. The law is an unbroken line of authority to say that at least in Australia or in New South Wales that document is evidence of the facts. 40

I suppose that the only part of the document which really becomes significant is what appears on page 2519 line 23. "Allegations have been made that Alexander Armstrong hired you to employ criminals to kill Alexander Barton".

JACOBS, J.A.: Is that a statement of fact on your principle?

MR. GRUZMAN: This was the allegation to which an answer was sought. The answer is a statement of the fact. 50

JACOBS, J.A.: Are you entitled to take part of the statement "Alexander Armstrong hired you to employ criminals to kill Alexander Barton" and

use that as a statement of fact in writing within the principle you are enunciating?

MR. GRUZMAN: The fact that the allegations have been made.

JACOBS, J.A.: One could say there it is in writing: "Alexander Armstrong hired you to employ criminals to kill Barton".

MR. GRUSMAN: It is only to the extent the Court would say the allegation of fact is a fact. If it is an allegation made by a little girl in a sexual case it is considered to be part of the evidence. It depends on the complaints made. In some cases it might be. I would not have thought that in this case it was any evidence of the fact. It is the answer that we submit is evidence of the fact. Your Honours in other words will be able to say in your judgment, if you wish, "It has been established to our satisfaction that Hume hired Momo and his friend to follow Mr. Barton" et cetera, with no other warrant than this statement in this document. That is only by way of putting a submission.

The statement that Hume hired Momo and his friend to follow Mr. Barton and if the opportunity arose to do him over, to frighten him, and to tell him there is more to come. At page 2521: "Why did Mr. Armstrong want to harm Mr. Barton in the way you have described ... Mr. Armstrong wanted to get even with him and to get his position back ... from about the end of October until now".

There is another matter which is only an indication. We know from the statement which was made to Inspector Lendrum that what was presumably in Barton's mind, certainly what Mr. Miller told Lendrum in his presence, was that Armstrong was keeping a tag on him from July. What was in Barton's mind was that he had been followed by Armstrong or at Armstrong's behest from July.

Hume apparently said from about the end of October till now. What an amazing thing that documentary evidence was found in Hume's documents suggesting in the clearest possible terms that it was in October that he first got instructions with car numbers and so on. One does not want to put too much reliance on one particular fact. How could one possibly explain that? There is evidence before the Court what was in Barton's mind was July. It is said Hume told the police is started in October. The documentary evidence in Hume's possession would establish to the satisfaction of this Court that it started in October. It is quite a cogent piece of evidence that Barton could not possibly have fabricated this document.

The significance is that it does tie Armstrong with the conspiracy.

TAYLOR, A-J.A.: You had findings in your favour that Armstrong was responsible for threats and the

telephone calls but was not responsible for the following. What difference would it make to the case found against you if Armstrong was responsible for the following? It would not make any difference.

MR. GRUZMAN: We put our case on alternate grounds.

TAYLOR, A-J.A.: Do you say it would make any difference if you attribute the watching to Armstrong?

MR. GRUZMAN: On one version of the case it could make a difference as to whether Barton was deliberately put into terror in this way by Armstrong. 10

TAYLOR, A-J.A.: On the case his Honour Street J. found against you it would not have made any difference.

MR. GRUZMAN: That is true. When you come to the public policy point.

TAYLOR, A-J.A.: That is a different point.

MR. GRUZMAN: That is one of the reasons I am trying to establish the facts. Then let us see what the law says on those facts. That concludes the submissions on Exhibit 29. 20

I am going to go now on to another subject which won't take very long. We think it is worthy to bring before your Honours. That is the question of the diaries. In this case one amazing thing was shown. Mr. Armstrong, Mr. Hume, Miss Catt and Miss Rosewell all lost or destroyed their diaries.

TAYLOR, A-J.A.: It was a bad year for diaries. 30

MR. GRUZMAN: It was terrible. In a space of a fairly short time we are going to -

TAYLOR, A-J.A.: There was no finding.

MR. GRUZMAN: That is one of our complaints.

TAYLOR, A-J.A.: They were destroyed. What follows from it?

MR. GRUZMAN: It is evidence of the conspiracy.

TAYLOR, A-J.A.: To destroy diaries?

MR. GRUZMAN: Yes. Allen v. Tobias, 98 C.L.R. 367 at 375. This is a joint judgment. Halfway down the page: "If anyone by a deliberate act destroys a document which according to what its contents may have been would have told either strongly for or against him, the strongest possible presumption arises that if it had been produced it would have told against him ... he is without the corroboration which might have been expected in his case". 40

JACOBS, J.A.: Was there a conspiracy in this case?

MR. GRUZMAN: I do not know. The principle is general. Destruction of diaries counts against a party in the way in which the Privy Council said. We seek to prove a conspiracy. We seek to establish that conspiracy by circumstantial evidence. The destruction of the diaries is part of that evidence. We say that the destruction of the diaries is evidence of the existence of the conspiracy. 10

JACOBS, J.A.: I do not read the Privy Council as saying anything of the sort. What they say is if you have evidence and you are in any doubt whether to accept it or not, and the person who has destroyed his diary denies the truth of that evidence, he is not going to get far with that denial, having destroyed his diary.

MR. GRUZMAN: We do not need any more. We allege there is a conspiracy. 20

JACOBS, J.A.: You allege and prove a conspiracy. You are using the destruction as part of the positive proof. That is the difference.

MR. GRUZMAN: To prove in a criminal case, and indeed in any case, the destruction of evidence, like flight and matters of that kind, is part of the circumstantial evidence of the commission of the crime.

JACOBS, J.A.: That may well be, but you do not get that from the reference you have just given. 30

MR. GRUZMAN: They are two different principles. This is one of the principles.

TAYLOR, A-J.A.: This is being put as part of your case, that there was an unlawful agreement to procure the execution of the document on the 17th January.

MR. GRUZMAN: Yes.

TAYLOR, A-J.A.: If you establish such an agreement by unlawful means, then that makes it an illegal document and voidable. 40

MR. GRUZMAN: That is over-simplifying and leaving out of account a lot of things. We will be putting that the evidence shows a conspiracy. It may have been directed to various matters. It may have been just to weaken Barton or to get him to make this agreement or any other agreement. Nevertheless we say there was a conspiracy to murder or to frighten Barton. We say we have proved that conspiracy by circumstantial evidence. To prove that that illegal conspiracy existed and to prove that particular people were part of it, the fact 50

that Armstrong for example or Hume destroyed diaries which probably would have had evidence of the conspiracy in them counts against them in evaluating whether they were parties to the conspiracy.

It is in much the say way from one point of view as the classic case of the man who washes out the poison glass that is supposed to have had the murder dose in it. The destruction of evidence is part of the circumstantial evidence to prove the existence of the crime. 10

The Privy Council said if anyone by a deliberate act destroys a document which according to what its contents may have been would have told strongly either for him or against him, the strongest possible presumption arises that if it had been produced it would have told against him. Because he had destroyed it you assume it tells against him. You do not know what is in it. But because he destroyed it therefore you assume it tells against him. 20

In this case Armstrong turned to his diary on a number of occasions for corroboration, but unfortunately he did not have the missing one. It is a matter of significance and importance in this case that Armstrong following some advice given by senior counsel destroyed these diaries.

JACOBS, J.A.: I do not think any of us are saying otherwise. My brother Taylor expressed it in much stronger terms. I would be inclined to agree. All I demurred to was the fact that there are two different principles. The case you referred to deals with one of them and the statement you made seemed to deal with the other. 30

MR. GRUZMAN: What we are really putting is in this case the two principles run together.

JACOBS, J.A.: Because of the circumstantial evidence?

MR. GRUZMAN: Yes.

JACOBS, J.A.: But you still have the problem in each case of circumstances that provide the link. You are still faced with that. Destruction of the diaries cannot provide the link. 40

MR. GRUZMAN: If the presumption is that the diaries would have contained evidence supporting the plaintiff's case -

JACOBS, J.A.: Supporting the plaintiff's case - not his allegation.

MR. GRUZMAN: All we ask is that your Honours throw into the judicial computer the fact that the absence of these diaries is to be given weight as a presumption that if they had been produced they 50

would have told against him. Secondly we ask you to feed in the information on the other aspect of circumstantial evidence.

We have followed the same principle of tearing out of the appeal books those matters relating to diaries.

There will be another principle I will deal with, and that is the forgery we submit it is of Mr. Armstrong's 1967 diary so far as relevant.

TAYLOR, A-J.A.: What you mean is it is a written up diary. 10

MR. GRUZMAN: Yes, pretending to be something it is not. Pretending to be a true contemporaneous record when in fact it was something made up for the case.

I am going to invite your Honour's attention to a few of the passages in this document. Volume 4 page 1190, Mr. Armstrong in cross-examination: "Prior to receiving Mr. Barton's affidavit what you did on the 7th January was not a matter of importance to you? A. It was not ... if I could look at my diary I could fix it more accurately". Page 1191: "Where is your 1966 diary ... I never threatened Mr. Barton so I would not have written it". In other words his Honour having accepted the threats, it may be accepted that they would have appeared in the diary. The only reason for not having written it he said was because he did not make the threats. "I put it to you that you must have had and in fact had a powerful motive for destroying the records of your movements during 1966 ... I decided to destroy the diaries with regret". 20 30

JACOBS, J.A.: Were they destroyed before or after the subpoena was answered?

MR. GRUZMAN: The evidence was that those proceedings were settled and they were not called upon.

TAYLOR, A-J.A.: After they were settled.

MR. GRUZMAN: Yes. Your Honour will say that it is likely that these diaries were not destroyed until after the present proceedings were started. 40

TAYLOR, A-J.A.: Were they the proceedings under the Moneylenders Act?

MR. GRUZMAN: Yes.

TAYLOR, A-J.A.: They were started in March.

MR. GRUZMAN: Yes.

TAYLOR, A-J.A.: Heard on 17th June or July.

MR. GRUZMAN: These were proceedings in connection

with the non-payment of interest on the \$300,000 loan.

TAYLOR, A-J.A.: They were proceedings to prevent Armstrong enforcing the security,

MR. GRUZMAN: Yes.

MASON, J.A.: Seven days' or fourteen days' grace.

MR. GRUZMAN: Yes. They were settled in April. The condition of the settlement was that all moneys had to be paid by 30th June.

MASON, J.A.: An extra six months.

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MR. GRUZMAN: Six months less. The default instead of going for twelve months only went for six months.

JACOBS, J.A.: All the Xeroxing was destroyed in October.

MR. GRUZMAN: Yes.

JACOBS, J.A.: And that made a fairly complete job of it.

MR. GRUZMAN: It is fairly interesting.

JACOBS, J.A.: You have drawn attention to 1967.

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MR. GRUZMAN: I would not be doing this unless we had a real point. We can prove firstly matter from which you will draw the inference that possibly these diaries were not destroyed till after this case commenced, contrary to the evidence. Secondly, the 1967 diary produced in Court was a forgery in the sense that it is fictitious.

JACOBS, J.A.: We have noted the date in 1967.

MR. GRUZMAN: Line 41 page 1194: "It is within your knowledge, is it not, that Frederick Hume's diary for the same period is missing ... I now hand you your diary". Page 1224 line 40: "Was that diary in existence when you discussed (this is the 1967 diary) with Mr. Staff destroying your other diaries? A. This entry was made I would say within two or three days of the events happening ..." The Eskell divorce matter was in 1962-63. At page 1236 he said he had no recollection of writing anything of a serious or detrimental nature to himself. He said he destroyed it because there were personal references to people in it. "There was only one reason you had your 1966 diaries destroyed, and that is they contained detailed references to your thoughts and intentions with respect to Mr. Barton? A. No ..." He says the only reasons the details of his intentions and thoughts with respect to Barton were not there was because he did not have any. If he had any, they would have been in the diary.

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TAYLOR, A-J.A.: Is there a finding by his Honour Street J.?

MR. GRUZMAN: His Honour found that Armstrong was making 'phone calls. It would be inferred that his mind went to the 'phone calls. In other words he had the sort of thought in his mind that produced those 'phone calls. I put to him "You would have written your thoughts in your diary?" He said "No, because I never had any thoughts or intentions about Barton at that time". If his Honour found he had thoughts or intentions he would infer he had the thoughts and would have written them down in the diary. He admits he writes down his thoughts. The only reason there were no thoughts in the diary he said was that he never had them. Having found actions produced by those thoughts you would infer he had the thoughts and therefore they were written down in the diary. 10

Page 1296 line 35: "You have given us various dates when that destruction occurred ... prior to December 1967". His dates vary. This case started on the 8th or 9th January, 1968. 20

TAYLOR, A-J.A.: The statement of claim was issued.

MR. GRUZMAN: The affidavit. Originating summons and affidavit. I think it was the 9th January, the originating summons and affidavit.

TAYLOR, A-J.A.: The statement of claim was issued on 9th February. You say earlier there were proceedings for injunction.

MR. GRUZMAN: Yes. The case started on 9th January, 1968. In this answer he gets perilously close. The most he will commit himself to is that the diaries were destroyed prior to December 1967. According to him it was just within a couple of weeks before the case started. 30

(Luncheon adjournment).

MR. GRUZMAN: I was dealing with page 1296 showing at that stage Mr. Armstrong was agreeing that the diaries were destroyed prior to December 1967. Page 1297, line 41: "Between October and December you destroyed them? A. Yes ... they were all destroyed before I had any inkling of these proceedings". At page 1299 line 18: "What brought this subject matter to your attention on the second occasion ...". 40

JACOBS, J.A.: Were there any proceedings current between the parties between June 1967 and January 1968?

MR. GRUZMAN: No, I would think not. The Landmark scheme of arrangement. That started about September 1967. 50

JACOBS, J.A.: And ended when?

MR. GRUZMAN: We came to Court on these proceedings when his Honour was giving judgment in the Landmark scheme of arrangement.

JACOBS, J.A.: Don't you get the benefit of the authority you have referred to, namely that the diaries would have been destroyed in these proceedings because there are no other proceedings in which they would have been destroyed?

MR. GRUZMAN: Yes your Honour, we do.

Page 1299 line 43: "In other words it is possible that the 1966 diary was in existence until a couple of weeks before the commencement of these proceedings? A. I do not think it is likely ... you then destroyed your 1967 diary? A. I certainly did not". 10

Some aspects of the 1967 diary were put to him. That diary is an exhibit in these proceedings. It was marked Exhibit A0. Our recollection is that the diary passed into the possession of the defendant. Before these proceedings started we wrote a letter asking that it be produced so that it could be placed among the exhibits so that your Honours can refer to the original diary. My friend Mr. Powell says he has no knowledge of where the diary is. 20

JACOBS, J.A.: Was it uplifted for transcription purposes?

TAYLOR, A-J.A.: There are photostats.

MR. GRUZMAN: The original diary was the exhibit.

JACOBS, J.A.: Where did the photostats come from? 30

MR. GRUZMAN: I think there were some photostats used in Court.

JACOBS, J.A.: Where did they come from for the purpose of the appeal book?

MR. GRUZMAN: It may be that they are copies of the photostats which were used in Court. The actual exhibit is the first-named defendant's diary 1967 with some masked portions.

JACOBS, J.A.: If it was an exhibit and it was sent to the Court office it would only have been uplifted under an order of the Court by the present cumbersome proceedings, and we would know whether it had been returned. Any exhibits were only uplifted by the appellant for transcription for the purpose of this case; not by the respondents. So far as the Court is concerned, if it is not in Court now it either was never in the Court of Appeal or it is with the appellants. 40

MR. GRUZMAN: Our pretty clear recollection on it 50

is because of the nature of the document his Honour permitted it to be uplifted by the defendant.

JACOBS, J.A.: Does that appear in the transcript?

MR. GRUZMAN: I am told it does not. It would have been consented to at the time.

JACOBS, J.A.: Under those circumstances you have to work that out with the respondents.

MR. GRUZMAN: We wrote to them a month ago.

JACOBS, J.A.: You would have to take substantive steps before his Honour Street J. to get an exhibit restored if he allowed it to be uplifted. 10

MR. GRUZMAN: We would like your Honours to have a look at the original exhibit. I suggest by looking at the document you can see it is fictitious.

JACOBS, J.A.: We will when it is shown to have been an exhibit and to be available. We do not want to get involved in that. We never allowed it to be uplifted by anybody except you. 20

MR. GRUZMAN: At page 1329 line 17: "What I am going to put to you is after seeing Mr. Staff on the first occasion you made up a new 1967 diary ... most times I do write with the same pen".

We sought to compare the 1967 diary, the early part of it, with known or proved facts which would have been in the diary if it had been genuine and so to try and check it. For example he said he saw Mr. Staff in March 1967 about the diaries. We looked to see if there was an entry there. At page 1337 it appears that there is not. Then we come to the 4th January, which is a fairly significant day where his diary says that he stayed at home and played tennis. 30

TAYLOR, A-J.A.: That is all that was in the 1967 diary, inconsequential matters. That was your point.

MR. GRUZMAN: Yes.

TAYLOR, A-J.A.: Right from the beginning.

MR. GRUZMAN: From the beginning up to the point where it was rewritten. In our submission after he received this advice he destroyed his existing 1967 diary and wrote up a fictitious one. That would have been done about March, April or May, before he went overseas. The first part, the relevant part, is fictitious; the latter part is genuine. 40

JACOBS, J.A.: Your point is that if the earlier diaries contained personal matters necessitating their destruction, how could it come about that just at the beginning of 1967 his behaviour

changed and trivia became the only content of the diary.

MR. GRUZMAN: Yes. We then seek to prove it by showing entries which are apparently false. For example he writes in his diary on 4th January he stayed at home all day. That is the day he saw Smith and Grant for hours. It is the sort of thing that would normally have been in his diary. He cannot explain it. All he can say is that his diary is wrong. Then we showed that in the diary the part where he started to write something out on 23rd February, and then he crossed it out. Page 1338. The indication is of a diary being written up at the one time and he makes a mistake. You could not do that if you were writing up the diary genuinely. 10

JACOBS, J.A.: Your main point is the effect of the destruction of the diaries.

MR. GRUZMAN: Yes.

JACOBS, J.A.: You are not really concerned to destroy the 1967 diary as an accurate record of events. 20

MR. GRUZMAN: Yes I am up to that point.

JACOBS, J.A.: Was it accepted as accurate?

MR. GRUZMAN: His Honour made no finding on it.

JACOBS, J.A.: Is this a very important part of your case that someone might accept this diary as accurate?

MR. GRUZMAN: No.

JACOBS, J.A.: Why spend your valuable time on it, because it is becoming valuable. 30

MR. GRUZMAN: It is significant. Supposing I can say to your Honour without fear of contradiction "Your Honours will accept that Armstrong concealed evidence relating to conspiracy and produced fictitious evidence relating to conspiracy." Is that not an important consideration in determining on circumstantial evidence whether he was party to the conspiracy? I am founding that submission. I would like to carry it a little further. 40

JACOBS, J.A.: It is certainly not evidence against you.

MR. GRUZMAN: It is evidence we seek to support our case by. Where he writes something up and says it is a mistake and crosses it out and puts it in another day is significant of a person who is writing up a false document.

The 4th January is referred to again at page 1347, and indeed 3rd January. Both omit

important matters which Armstrong in the normal course of events would have written in his diary. Page 1348 line 23: "What you did when making up the diary was to exclude all matters which you thought may prove embarrassing". The 3rd January is when he goes to Smith and says "Tell Barton to make this offer". "That diary is completely genuine and correct". Line 43: "If Mr. Grant and Mr. Smith said I saw them ... I prefer to take their evidence on that ... that would be my answer". 10

TAYLOR, A-J.A.: His Honour made no finding about this.

MR. GRUZMAN: No, none at all.

TAYLOR, A-J.A.: Before Mr. Justice Street this was part of your attack on Armstrong's credit.

MR. GRUZMAN: Yes.

TAYLOR, A-J.A.: He desolated his credit so why would he make a specific finding? You are not going to take up our time establishing that Armstrong did not have any credit. 20

MR. GRUZMAN: No.

TAYLOR, A-J.A.: You are using this as part of your conspiracy.

MR. GRUZMAN: Yes.

TAYLOR, A-J.A.: This is going to an aspect of the case which I understood you were going to put in writing what the submission is and what the effect of it is.

JACOBS, J.A.: The findings you wanted made.

MR. GRUZMAN: It is one of the matters on which I wish your Honours to make a finding. 30

TAYLOR, A-J.A.: What are we to take from this - that there is a conspiracy? That does not help unless it is a conspiracy to make him sign.

MR. GRUZMAN: I ask you to reserve judgment on that until you have heard the legal aspect. The object of the pressure or the conspiracy to produce the pressure we will be submitting that it does not matter whether it was to produce this particular deed, generally to weaken Barton, or what it was. 40 We have to take it a step at a time. This is a somewhat different argument to what we put to his Honour Street J. His Honour said "It is sufficient for my purpose to say it has not been established to my satisfaction that the object of the conspiracy was to produce this deed". Before your Honours we say that does not matter. Whatever the object of the conspiracy was, if it was a conspiracy to produce pressure that will be sufficient for our purpose. We will show your Honours on the 50

law why that is so. The object of going through this is to show your Honours there was a conspiracy and it involved Armstrong. The aspect of it where we say it involves Armstrong is we say Armstrong destroyed evidence of the conspiracy and created positive evidence in furtherance of a conspiracy. That is something that Armstrong did. We will be first of all seeking to demonstrate that he destroyed evidence of conspiracy, and secondly he created false evidence of conspiracy. Later on we will submit to your Honours as a matter of circumstantial evidence that is one of the matters to be taken into account in determining whether Armstrong was a party to the conspiracy. 10

TAYLOR, A-J.A.: All this will be achieved if you can satisfy us that Armstrong was a party to Novak and Hume shadowing and telephoning Barton.

MR. GRUZMAN: Partly. If your Honours were satisfied on that, that is one thing.

TAYLOR, A-J.A.: I tried to point out to you a week ago I thought that finding in that limited form was well open. Do you say it is not sufficient for you to get it in that limited form? 20

MR. GRUZMAN: In the end it probably is, but I have to take the long way round. In the end probably if your Honour makes that finding that is all we need.

I am going to finish the various aspects of the facts within quite a short time.

The other point on which this became relevant was the whole question of Vojincvic's 'phone call to Hume. It related back to Armstrong's diary. That is probably one of the real reasons why the fictitious diary was produced. Hume's diary at the same time was destroyed, and Miss Rosewell's diary for the same time was stolen. 30

TAYLOR, A-J.A.: Hume's diary was stolen.

MR. GRUZMAN: Page 1350 line 53: "In that case your diary for that day, the 4th January, is a complete lie ... it is not intended to be a complete lie ... the diary is probably inaccurate ... I may have written this diary a week later". Page 1353 line 8: "Every word you wrote was a lie, was not it ...". Page 1354 line 19: "Let us come to the entry of 12th January". There was a minute book chock full of Armstrong's presence. His Honour Street J. interposed the question: "These were genuine flesh and blood meetings, were not they? A. Yes". We were able to check his entry in the diary against that. Page 1354 line 19: "Let us come to the entry of 12th January ... spent day at home, walked in gardens, et cetera ..." Then I put to him he was at these company meetings. He can give no explanation of it. On 23rd April he said he went to Mr. Grant's place for dinner. "Q. Did you and Fred Hume and your wife go to Mr. Grant's place for 40 50

dinner ... allegations made by Vojinovic? A. No. None at all." Then at page 1362, line 33, "Q. According to the diary you were skiing with Fred Hume". At page 1363 line 17, "Q. You feel that Hume deceived you by not telling you on 20th January ... in no uncertain terms about this matter".

I could just mention and give your Honours a reference at page 618. Mr. Smith says that Armstrong came to see him at three o'clock on 10th January. His diary for 10th January says, "Spent most of the day at home, still discussing Barton matter". On other days when he has been to see Smith he writes it in. 10

Perhaps I should go to Mr. Grants evidence at the back of the book. It fits in better on these diaries and your Honours will see that it is proof out of Mr. Grant's own mouth that the 1967 diary was destroyed. Page 6/2024, Mr. Grant in chief - and I ask your Honours to follow this evidence carefully because it is proof out of Mr. Grant's mouth that the 1967 diary was in fact destroyed and this document that went into evidence must be a fictitious document - I show him the document, Exhibit 62, which is the subpoena; "Q. Were any of the documents mentioned in it brought in with it? Two books were brought in - 1966 and so much of 1967 as had then passed". We are now in April of 1967 and we have got to see what happens to those books. "Q. Did you take any photocopies of any of these books?" It is rather significant what a lot of concern was shown by the legal advisers about these books. The relevant period was round about December and early January. That is rather interesting, that Mr. Grant says that the relevant part of these books was December, early January, the very part that your Honours are concerned with. "And I took photocopies of the entries in the diaries during those dates" - that is December, 1966 and on. 20 30

You can imagine what confronted the legal advisers of Mr. Armstrong when here is Mr. Grant in his evidence in chief - remembering the context that this is supposed to be, only personal matters; it is not supposed to have had anything to do with this case; it would have been twelve months later that December 1966, January 1967, became relevant, but the thing that hit the legal advisers of Mr. Armstrong was this very period December 1966, January 1967. They took photostats, forty pages of photostats; the most fantastic document probably that they had ever seen. 40 50

There is no mistake that is December 1966 and January 1967. At line 31, "Yes, I did take some other copies of any entry that could possibly be conceived to be relevant ... as a result of what Mr. Armstrong told you? A. Yes". The only Zerox copies which are relevant are December 1966 and January 1967. "Q. What was that decision ... A. No". It is of some importance to read the

document and he is asked to put on his oath and eventually it is put to him by his Honour, "You read these documents, you photostatted them. Do you say that the diary produced in Court is the same as what you destroyed?" and he was not prepared to put his oath on that.

TAYLOR, A-J.A.: He said he could not say. You asked him "Do you have any recollection of any of the actual entries for either of these months?" There is no evidence about what was in the entries that were destroyed but you are going to ask us to draw the conclusion that they contained such entries as "I will kill Barton". 10

MR. GRUZMAN: If the true 1967 diary was destroyed, then as a matter of law the plaintiff is entitled to the presumption that there were matters in there about this matter that would have adversely affected Mr. Armstrong. We are entitled to that presumption of law and Armstrong brought that on himself by destroying the evidence. 20

Let me take it further before I make the submission on it. Mr. Grant says he had no details - page 2026, line 40 - and he cannot tell the actual entries. Then he gives some evidence about the topics. At page 2027 he is asked by Mr. Bainton at line 9, "Q. After these proceedings commenced ... I did. His Honour: Q. You have seen the 1967 diary? A. Yes". and that contains within it entries of a personal nature. At page 2026 Mr. Grant said there were comments concerning the plaintiff and Mr. Armstrong's opinion of him at a particular time, at line 49. There is no doubt that Mr. Armstrong's opinion of Mr. Barton appeared in the document; Mr. Grant said so. 30

Now we come to page 2045, line 4, speaking of Mr. Armstrong coming to Mr. Grants office. "Q. What documents did he bring you which fell within the description of diaries?" I seek to stress this; Mr. Grant subsequently seeks to deny it. "The 1966 and 1967 were brought to your office ... come back to Mr. Armstrong". 40

TAYLOR, A-J.A.: Which diaries are you talking about? "Q. Did you ever see the diary for 1961, 1962, 1963, 1964, or 1965? Were they brought to your office?" This is the 1965 diary. All these questions relate to those diaries. That has nothing to do with 1966 or 1967.

MR. GRUZMAN: We come over the page. I can save your Honours going through that. At page 2048 line 10, "Q. You went back to Mr. Staff to ask the same question that you had asked towards the end of the preceding year ... the first one had been during 1966" - line 11, page 2048 "Q. So you went back to Mr. Staff again ... preceding year? A.Yes". 50

JACOBS, J.A.: Is this the book you asked Mr. Powell to produce?

MR. GRUZMAN: Yes.

JACOBS, J.A.: It was apparently with the Court.

MR. GRUZMAN: The significance of it is that it appears to have been written with the same pen and ink. The early part appears to be "a fill-in"; the latter part of the book appears to be genuine.

JACOBS, J.A.: One could draw the conclusion that they were not very accurate days in January.

MR. GRUZMAN: But you will see in a moment from Mr. Grant's evidence it is put beyond doubt; you will not need to have inference. At page 2048, line 11, "You say you did go back again to Mr. Staff ... some aspects of the 1966 and 1967 diaries". So far it is abundantly clear we are dealing with the 1966 and the 1967 up to April - photostats of December 1966 and January 1967. 10

"Q. Then did you learn something about the destruction of these diaries ... I destroyed them". These were Zerox copies of December 1966 and January 1967, the relevant time but in two diaries. "Q. How many Zerox copies?" and at line 27, "Q. It is your understanding that you were destroying the sole remaining evidence of what was in the diaries which were destroyed ... portions of them, yes". It is beyond doubt on Mr. Grant's evidence that the 1967 diary for the relevant period was destroyed. There is no doubt about that whatever. 20

Then I put it to him, "Q. It was your understanding Mr. Armstrong destroyed his 1967 diary, wasn't it? A. No, no". It suddenly hits. He wriggles and squirms but there is no question about it. "Q. Look, sir, you have told his Honour ..." and then we read out the questions and his Honour asks, "Q. Was it your understanding it was October 1967 ... is it true or false? A. I did not intend to convey it". Over the page, "Q. Did Mr. Armstrong say to you 'I will not destroy my 1967 diary'? A. No, he did not ... no, that is not so". That cannot be right, of course, and Mr. Grant is simply going back precisely on the evidence which he gave in chief and repeated in cross-examination shortly before. So it is enough for me to put from Mr. Grant's evidence it was proved beyond doubt that the document produced in Court by Mr. Armstrong as a genuine 1967 diary was a false and fraudulent 1967 diary for the relevant period and that is a pretty serious matter, having pretty serious repercussions when one comes to consider the whole of the case and the evidence on conspiracy. I will come back to that general aspect later. 30 40 50

MR. GRUZMAN: I am going to Hume's diary, and this will be quite short.

JACOBS, J.A.: Before leaving the 1967 diary of Mr. Armstrong - allegedly - I see on the 16th the note "Barton - last extension, 3 im" - it must be 3 pm.

MR. GRUZMAN: There is no evidence to support it.

JACOBS, J.A.: Was not Mr. Grant in touch with Mr. Bowen, or Mr. Smith in touch with Mr. Barton or anybody?

MR. GRUZMAN: Nobody has given evidence about the 3.00 pm deadline in that way. The only evidence is that at 8.20 on the morning - -

JACOBS, J.A.: We know all that. Is there anything beyond that? Had Mr. Grant fixed a time with Mr. Bowen? 10

MR. GRUZMAN: We have looked at it but so far as we can see this is an entry that stands on its own.

JACOBS, J.A.: The implication is obvious, you need not spell it out; Mr. Powell can deal with it.

MR. GRUZMAN: The entries in January 1967 in the diary must have been of a pretty unusual nature for senior counsel and the solicitor to pick those entries out for photostatting, preservation and consideration. Look - we say to your Honours - at the diary produced for 1967. What is there in that document? 20

TAYLOR, A-J.A.: They would also want innocuous statements. Do you say they would have photostatted them if they could do him any harm?

MR. GRUZMAN: No.

MASON, J.A.: Is not the question what was meant by Mr. Grant when he used the expression "relevant period"? In the answer read to us he said the relevant period was December 1966 and January 1967. It is really a question as to what was meant by the relevant period. Did he mean relevant, having regard to the litigation as to which the subpoena had been issued? 30

TAYLOR, A-J.A.: Did the subpoena specify a date?

MR. GRUZMAN: Just diaries, I think.

MASON, J.A.: Having regard to the real issues in the case, the relevant period would be December and January, would it not? That was when the agreement was negotiated?

MR. GRUZMAN: Yes. 40

MASON, J.A.: So Mr. Grant may well have been saying "We photographed entries of December and January", because they could be the only entries in the diary relevant to the issue.

MR. GRUZMAN: It could be.

MASON, J.A.: That was probably why they were photographed, I would have thought.

MR. GRUZMAN: It could be one possibility or the possibility but, looking at the document produced, what is in there for January 1967, in the diary produced, which would warrant that attention and why would it be destroyed?

MASON, J.A.: Only if it does refer to events concerning the litigation, as a matter of precaution, looking at the diary he would have photostatted what related to litigation - unimportant though it may be.

10

MR. GRUZMAN: Mr. Grant said that there were comments about Mr. Bowen and so on in the document that he saw.

MASON, J.A.: That is another matter.

MR. GRUZMAN: So far as we are concerned the real significance and the point we desire to make is only this: it proved beyond any shadow of doubt whatever that the document produced to the Court was a fallacious document.

TAYLOR, A-J.A.: You would be in considerable difficulty if it was not because, amongst other things, there is the Sackville matter. I thought you had rather left Sackville - you find it a strangely unattractive place!

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MR. GRUZMAN: That is the problem. If I do not take it up, and do not explore it in details your Honour says I am not interested in it, and then when we do - we are putting it only shortly because we could spend a week on Sackville.

JACOBS, J.A.: My brother Taylor was being satirical in referring to that, if you were to describe your treatment as short.

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MR. GRUZMAN: I can deal with it, but please do not hold it against me if I have not.

JACOBS, J.A.: You dealt with it aptly, so no-one is holding it against you for dealing with it shortly. But all that only proves, on your account, that Mr. Hume was not there. That means that he did not speak to Vojinovic. I do not think the case turns on that.

40

MR. GRUZMAN: I would not like the issue to be in any way clouded. The purpose, the reason - only one thing matters: that we have proved beyond any shadow of doubt out of the mouth of Mr. Armstrong's solicitor that Mr. Armstrong produced to the Court a false and fraudulent document, pretending it was his diary for 1967.

TAYLOR, A-J.A.: You say he admitted the photostat diary was false? I am not so sure it is as clear as all that. You may be right.

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MR. GRUZMAN: I would ask your Honours to look at

this matter as a result, not of some sort of astute cross-examination because it is evidence in chief. Mr. Grant said "I photostatted December 1966 and January 1967. I kept those photostats and Armstrong told me that he had destroyed those diaries and I destroyed those photostats as the only remaining evidence of those diaries" - and that is the position.

TAYLOR, A-J.A.: What turns on that?

MR. GRUZMAN: Of course, it is one of those things that stands on its own, no more than Exhibit 29 does. You look at all the surrounding circumstances and see what Mr. Armstrong was likely to do - would he be likely to do a thing like that? You look at the diary and the internal evidence of the diary and the fact that pressure was being brought to bear, that we know, what his Honour found, pressure was being applied and we look at Armstrong's propensity for writing. We know that he is a man who writes inordinately. We know that he would be writing down there such things as "Hate Barton, get Barton", everything you could imagine would be in that diary. Then knowing all those facts and putting them together there is no possibility of doubt that Mr. Armstrong put before the Court a false and fraudulent document. He would have written there his enormous thoughts. 10 20

One of the reasons for that document was the 6th or 7th January. That in itself, perhaps, was not terribly important but the lengths - -

MASON, J.A.: What foundation is there for the submission - "We know that Mr. Armstrong would have recorded in his diary 'his enormous thoughts'" which you put. 30

MR. GRUZMAN: The foundation of that is to look at the documents from Mr. Armstrong, which were in evidence.

MASON, J.A.: Documents other than the diaries, or the diaries?

MR. GRUZMAN: Documents other than diaries.

TAYLOR, A-J.A.: Leaving aside what Mr. Grant said in the passage to which you have referred relating to what he saw in those diaries when they were brought in, is there any evidence of the contents of Mr. Armstrong's diaries that indicated that he recorded in the diaries these enormous thoughts? 40

MR. GRUZMAN: Yes, there is, the internal evidence of the diary itself. For example, even on the basis that we are putting to your Honours, he would cut out as much as possible but would still leave in, for example, "Barton was a bastard to the end". There are other entries. For example, he refers to a particular person as a "low Goulburn type" in the diary. He cannot restrain himself. He is just one of those people who simply cannot restrain 50

themselves, so in the diary before your Honours you will see one or two comments of that kind.

MASON, J.A.: There is no need to take up time going through it now, but if you place reliance on it perhaps you could get the reference down on paper and hand it up.

MR. GRUZMAN: I can give your Honours a particular reference now. At page 1225, line 40: it was put to him "Q. One of the things that concerned you was the Eskell divorce? A. Also my personal private thoughts about many people in these diaries ... some of which may have been incorrect ... I just write a diary normally ... A. Because there was again personal reference to people in it". And further he says - and we place reliance on this - at the same page and following that the only reason there was no reference to his thoughts about Barton in the diary is because he did not have any such thoughts That is the matter which I put to your Honours before lunch: normally that if there is a finding - as there is - that Mr. Armstrong (to take it no further) made telephone calls threatening to kill Mr. Barton - the next point is that his thoughts must have led to these telephone calls being made. He put forward that the only reason he did not write in his diary thoughts about Barton was that he did not have any such thoughts. Once your Honours are satisfied that he did have thoughts, it is an inference that he wrote thoughts in the diary.

TAYLOR, A-J.A.: What sort of thoughts?

MR. GRUZMAN: The sort of thoughts that led him saying to Barton "I will get you. I will kill you". The sort of thoughts that he had about Eskell, and if you exchange that to "punish Barton". Take 12th January where his Honour finds that he said "Sign the document or else" - the thoughts leading up to that would have appeared and possibly conversations would have appeared in the diary. Those are cogent reasons.

TAYLOR, A-J.A.: It is a rather long jump from there to ask us to find that on a specific day he wrote specific things in the diary.

MR. GRUZMAN: I do not have to ask your Honours to do that.

TAYLOR, A-J.A.: Things of a nature which would indicate that he was going to harm Barton?

MR. GRUZMAN: That is right, and that is what we are asking the Court to find and that is what we are entitled, in our submission, to have the Court find. In the Privy Council case - -

TAYLOR, A-J.A.: How does that Privy Council case help you? It dealt with log books that went over the side - records - and log books in that

particular jurisdiction are evidence, and the entries were regarded as evidence of the facts.

MR. GRUZMAN: Are not diaries in this jurisdiction evidence?

TAYLOR, A-J.A.: I would not have thought so. No man's diary can be used against him if he swears to the contrary. Log books are evidence of the facts put in them.

MR. GRUZMAN: In the hands of a cross-examiner surely it must lead to the elucidation of the truth. 10

Your Honour, Mr. Justice Mason, might I point out that in the beginning of this book is a summary of what is in it.

JACOBS, J.A.: What is the position? Do you ask us to reject the evidentiary value of these diary entries altogether?

MR. GRUZMAN: Yes.

TAYLOR, A-J.A.: The lot?

MR. GRUZMAN: No. We have made our case clear up to a certain date, to about April, it is false. 20

JACOBS, J.A.: So that no weight can be given to it whatsoever?

MR. GRUZMAN: We can rely on such as admissions. We say it was made up by Armstrong in a way to suit his case.

TAYLOR, A-J.A.: You mean it was made up and written by him in April, 1967?

MR. GRUZMAN: Yes.

TAYLOR, A-J.A.: And he wrote up January, February, March and April? 30

MR. GRUZMAN: Yes, but I do not restrict myself to some such time. The internal entries of the diary bear that out.

JACOBS, J.A.: What about the entry of the 16th to which you drew our attention a little while ago? I notice that the real reason why Mr. Justice Street rejects the conversation of the 16th was because he saw no occasion for it and yet on the same day, according to the "false diary", Mr. Armstrong is saying he gave Barton his last extension. 40

MR. GRUZMAN: Yes. That is why we say we accept some of it as admissions.

JACOBS, J.A.: How weak is it to compare entries made months later with a contemporaneous entry?

MR. GRUZMAN: If a man embarks on a dishonest course of conduct of this kind then he has to take the consequences. It does not follow that everything in it is untrue. If he said "The sun was shining today", perhaps it was. If he said "I am anxious to get this deal over. I have a burning desire to get it over" - maybe it is true or maybe it is not. So far as he was concerned, he was putting in there the things which he thought would help. He might have been wrong. In other words, he may have made an admission here of a fact which in fact harmed him. 10

TAYLOR, A-J.A.: You cannot have it that way. You have got to make up your mind. You submitted to us and submitted to the trial Judge that it was a forgery. If it is a forgery you cannot call it in aid this way because you now seek to say that if you take the entry about the "last extension, 3.00 p.m. tomorrow" as relating to the telephone conversation, you are now asserting that the entry there is genuine? 20

MR. GRUZMAN: It is the same as a witness I had in a case where I had occasion to put a private inquiry agent into the witness box whom I was convinced was an untruthful witness. We so opened the case to the Judge and we said to his Honour - Mr. Justice Neild, I think it was - "I am going to call one witness who in our opinion is a complete and utter liar but I am going to call him in my case". We did, and his Honour accepted some of his evidence. 30

JACOBS, J.A.: One can understand that situation arising, but you had to win the mind of Mr. Justice Neild in those far-off days and that might have been the way you did it. But the theoretical approach of saying "You should accept this piece and reject that because theoretically I am entitled to it" does not necessarily convince. Do you say that he wrote this at the time or not?

MR. GRUZMAN: No, what we say - - 40

JACOBS, J.A.: Do you say that those words went into the diary at that time?

MR. GRUZMAN: I can only put our submission as clearly as I can on what we believe the evidence admits.

JACOBS, J.A.: Obviously it admits of anything.

MR. GRUZMAN: It does, but what is the likelihood? Here he is told by senior counsel some time in April - I will just read what he was told (page 1296 line 30) - "On the subject of the diary you say you were told by your ... brought out in Court". 50 And he would have gone home and thought "Oh, my goodness". First of all, he is a prolific writer, he cannot help it, and he says some awful things - there are some awful things in this diary". One has to imagine that having received this advice he

goes home - it is still 1967 and only April or so and he is still able to buy another new diary. He goes home and sits there and starts to write it out, writing out one to give it some verisimilitude. On the other hand it was probable, we would suggest, if you take the entry of Tuesday, 16th, "Rang Barton, 8.20, told him unless he signed he would get killed" - it was probably full of nasty thoughts. That is probably what it said. Having read his other documents, those documents do show that is probably what that document said. So he wants to put something in which will cover the conversation but which is not nasty. 10

Mr. Grant will not stake his oath as to any

TAYLOR, A-J.A.: He said "The general tenor of what I wrote is much the same". That is not much the same.

MR. GRUZMAN: Mr. Grant was not asked by anybody. First of all, the first question he was asked - which he declined to stake his oath to - rightly - was that the entries were not the same. The second thing was that he said the general subject matters were such and such, including opinions of people. 20

TAYLOR, A-J.A.: No honest man could have said that if he wrote the entry that you say. It has got to finish there, because you have the finding from his Honour that he is a reliable and honest witness.

MR. GRUZMAN: That is right. But just the same your Honours do not have to throw commonsense away. These are important factors; his Honour, Mr. Justice Street, made that finding about Mr. Grant without coming to a conclusion on the diaries. That is putting it in reverse, it is the same way as making the conclusion about Exhibit 29. 30

JACOBS, J.A.: He did not make a finding about the diaries. Why should he?

MR. GRUZMAN: We submit it was necessary.

JACOBS, J.A.: Did not you agree some time ago that it dealt with credit only? 40

MR. GRUZMAN: That is right, but we can put it this way: that because his Honour was not required to make a finding on the diaries, then he did not consider possibly enough of the evidence appertaining to Mr. Grant's credit. How does one explain what happened with Mr. Grant and the diaries and Mr. Grant putting forward on behalf of his client the 1967 diary which I put fairly and squarely to him on his own evidence had been destroyed?

JACOBS, J.A.: I think you really put all this. I think you are really wasting valuable time. 50

MR. GRUZMAN: I was answering Mr. Justice Taylor.

It is a complicated case and it is not, unfortunately, easy and simply of presentation.

I am going to turn now to the Hume diary, which is not a lengthy matter, but is worthy of mention.

TAYLOR, A-J.A.: Why are you taking us to the Hume diary? Nobody would believe Hume surely!

MR. GRUZMAN: It looks as though it was part of the conspiracy to destroy the evidence.

TAYLOR, A-J.A.: You mean that Hume destroyed his own diary? 10

MR. GRUZMAN: Yes, it may corroborate that part of the conspiracy to destroy evidence.

TAYLOR, A-J.A.: He probably did.

MR. GRUZMAN: If I can have that finding, that is all I want.

JACOBS, J.A.: We think you should get on, Mr. Gruzman, to this extent that if the relevance of proving positively this destruction does come forward, you can deal with it at a later stage. Deal with it afterwards. 20

MR. GRUZMAN: It is only going to take ten minutes, and then it is done.

Hume's evidence appears in the document at 6/177; 7/66(?) and it starts off "Have you got a diary in existence now which would tell what you did in October, 1967? A. No - during October, 1967". We found out that Hume was using his diary during this period to make reports to a solicitor and by the simple expedient of getting the reports that he made I was able to show successfully that what he swore was untrue. Here he swore that in August 1967 his diary was stolen and I am able to prove conclusively that in October, 1967 he was using his diary. 30

TAYLOR, A-J.A.: He had some story that he would come straight back from raids and dictate something?

MR. GRUZMAN: Yes. Then he said it was a false document. He was caught red-handed on the false allegation about the diary being stolen because the date of the stealing was fixed. There had been a robbery at his flat and he said that amongst other things the diary was stolen and that was in August, 1967. He swore that he never then started another diary. "And you never started a diary since August, 1967 ... you understand that? A. Yes." Then I put to him that Ziric could not obtain divorce evidence, he was not an agent and he said he said that. He put that in very clear terms - "Ziric is not a divorce agent". I said to him at the bottom of the page "I again warn you of the consequences of false swearing ..." Novak was there and he claimed 50

that Novak was independently employed by the client at the same time although he is making the one return about what they did. "Is it true that on 11th October, 1967 ...". So I put to him from this detailed report to the solicitor, which he made, details of times and events and so on. At line 32, page 1812, "This is a copy of your diary, is it not? A. No. I don't have a diary ... but it is not correct". That is his evidence, which was not very convincing. He said he had never given evidence in that divorce case. It is wrong, because "... stated there". His Honour asked him what his fears were about his diaries, etc.

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JACOBS, J.A.: Then his Honour asked a number of questions at pages 1818 and 1819.

MR. GRUZMAN: Yes. I did not propose to take your Honours through it.

JACOBS, J.A.: His Honour wanted to make clear that Mr. Hume himself was clear about what he was being asked and it turned out that he was clear, and he reiterated his answers.

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MR. GRUZMAN: Yes. While we are on the point, at page 1966 is the evidence - "You are wrong. I was interviewed on the 18th ... wrote the name Vojinovic, didn't you? A. Yes." So that Hume, your Honours might think, was completely caught out. I do not think your Honours will accept his explanation, but I think your Honours will accept that when he swore that his diary was stolen in August that was simply an untruth. Then your Honours would say "Why would Hume lie about his diary?" It is obvious, if the plaintiff's case is true, that Hume's diary would have contained much relevant evidence. Hume was one of the conspirators and his diary was missing and that is a very significant and important matter.

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The last one is Miss Rosewall, who was the other diarist who was present up the river.

TAYLOR, A-J.A.: The only point in saying there was something wrong with her diary could be the fact that it could have recorded whether she was up the river.

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MR. GRUZMAN: Yes.

JACOBS, J.A.: And you use that only for credit? You are not going into the conspiracy business with her too?

MR. GRUZMAN: There is no doubt there was a sort of conspiracy within a conspiracy, if it be relevant, because if people club together to give false evidence about issues, it is not very nice.

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JACOBS, J.A.: The only issue in this case whatever on your submission - whatever the reason for this unanimity about the river events, there is no issue in this case affecting Miss Rosewall. The loss of her diary goes to her credit only.

MR. GRUZMAN: Yes. I will leave it at that for the moment. It is a bit late on a Friday afternoon, so please do not take that -

At page 1404 (Volume 5) I asked her "Did you and Mr. Murray work out what happened? A. We did not have to work out ... at the end of last year". I ask your Honours to note that. "That was for the end of 1967 ... and things of that nature". From the diary that would help it. "I did have a day book in my office ...". So the position was that towards the end of 1967, as with Hume and Armstrong - 10

TAYLOR, A-J.A.: Are you suggesting that they had a meeting and a sort of book burning?

MR. GRUZMAN: Yes. I will come to that.

Miss Rosewall ends up with the belief - "You believed it to be a possibility that your diary was stolen from your car ... I would not think so, no". Mr. Hume's diary was stolen from his office, Miss Rosewall's diary was stolen out of the car and Mr. Armstrong destroyed his diaries - all probably containing material and relevant evidence relating to these proceedings. 20

I propose to hand up two documents that might be of some assistance to your Honours.

JACOBS, J.A.: Is this an outline of the matters which you challenge?

MR. GRUZMAN: No.

JACOBS, J.A.: I wished we could have had that by the weekend.

MR. GRUZMAN: We should have done it, but it has not been done. 30

JACOBS, J.A.: It is a great pity, because we have rather laboured without it during the last few days and it would have been useful over the weekend.

MASON, J.A.: Will it be forthcoming on Monday?

MR. GRUZMAN: We are proposing to work on it tomorrow.

These two documents are headed (1) "Portions of evidence relating to events justifying fear in Barton" and (2) "Portions of evidence relating to acts demonstrating fear and propensity for fear". 40

TAYLOR, A-J.A.: They are the findings, above all others, you have got in your favour.

MR. GRUZMAN: Yes. We probably do not need them. In fact they were handed up to his Honour Mr. Justice Street and they have just been improved and re-referenced. We are not asking your Honours to read them, but they are just there.

I might tell your Honours now what I propose to do. I propose to make some submissions to your Honour on the effect on Barton's mind of these matters.

JACOBS, J.A.: That is, as my brother Taylor pointed out to you a moment ago, a finding you have very much in your favour. I say to you seriously, can you afford the time on that?

MR. GRUZMAN: The general basis is going to be this on compartmenting - can you possibly say that in one compartment you have got fear and in the other compartment you have got a sound contracting mind? That is the substance of what I am going to put and I am going to put that what his Honour put was quite impossible.

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JACOBS, J.A.: I thought you meant you were going to go through the gravity of the events or the gravity of the effect of them on the mind.

MR. GRUZMAN: I am not going to go into that except by reference to this matter.

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JACOBS, J.A.: You can assume, I think, and my brethren will correct me if I am wrong, that we accept the gravity and the effect of the found facts on the plaintiff's mind.

MR. GRUZMAN: I thank your Honours for that. Out of this comes a consideration - how would that affect his contractual mind?

TAYLOR, A-J.A.: Whether in the light of that it was not a pertinent matter on his mind?

MR. GRUZMAN: Exactly. I am going to make a few submissions on that and a few submissions on the broad outline of the facts particularly, and then we will come to the law - in respect of which we will have some further authorities for your Honours. That is what is going to happen, so far as we are concerned, next week.

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There are one or two matters I have not mentioned, except vaguely. There is the conversation of the morning of the 16th - just a few matters, but not a great deal - in the factual side of the matter.

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JACOBS, J.A.: You would rather leave commencing on that further factual area until Monday?

MR. GRUZMAN: Yes.

JACOBS, J.A.: I do think you can cover it in a fairly small time, before getting onto the submissions that you wish to make on the law.

MR. GRUZMAN: I think so, too, your Honour.

(Further hearing adjourned until Monday, 8th March, 1971, at 10.15 a.m.)

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IN THE SUPREME COURT
OF NEW SOUTH WALES
COURT OF APPEAL

Term No. 22 of 1969

CORAM: JACOBS, J.A.
MASON, J.A.
TAYLOR, A-J.A.

BARTON v. ARMSTRONG & ORS.

TWELFTH DAY: MONDAY, 8TH MARCH, 1971.

JACOBS, J.A.: Yes, Mr. Gruzman.

MR. GRUZMAN: Your Honours, the document which contains our submissions as to the findings which his Honour should have made, and that we ask your Honours to make, is in the final stages of checking the typing and it should be available within the next hour or so and it will then be handed to your Honours. 10

I do not propose, when I do hand the documents to your Honours, to speak in detail to the various matters. It is quite substantial when one looks at it. At this stage I would like only to invite the attention of your Honours to one or two matters in his Honour's judgment which we submit are significantly incorrect. The first one, and it is not without substance, is the reluctant vendor. The concept that Mr. Armstrong was a reluctant vendor is one which is used by his Honour, and it obviously colours his Honour's judgment, as one of the reasons why he rejects the conversation of 16th January. 20

I have already made some submissions to your Honours about the reluctant vendor and your Honours have heard the evidence. I do not propose to repeat it. 30

TAYLOR, A-J.A.: That is the commercial aspect?

MR. GRUZMAN: Yes. It is sufficient for my purposes now to say it is abundantly apparent on all of the evidence that Mr. Armstrong was not a reluctant vendor.

TAYLOR, A-J.A.: Could you tell me what is meant when Mr. Barton said, "There were proceedings of 7th December in the Equity Court between Southern Tablelands Finance Company and Landmark with respect to an injunction to restrain money being advanced by U.D.C.". Do I understand that from these proceedings were brought by Southern Tablelands to prevent U.D.C. lending the money to pay Armstrong out? 40

MR. GRUZMAN: That was the form of proceedings.

TAYLOR, A-J.A.: Nothing was tendered about that. That was the form of the proceedings?

MR. GRUZMAN: Yes.

TAYLOR, A-J.A.: That was on 7th December. Later he said he thought it was started about the end of November. That would afford a very good reason for U.D.C. not going on with the loan, wouldn't it?

MR. GRUZMAN: Yes, it would. Although it appears to be so I have not got the impression, on the evidence, that that was the reason. Although it appears to be obvious, nevertheless I must say I have not got the impression that was the reason U.D.C. did not proceed with the loan. 10

TAYLOR, A-J.A.: Barton went on to say he had some discussion with them which would appear to be somewhere about 8th, 9th, 10th December.

MR. GRUZMAN: That is right. None of the counsel before your Honour were in those proceedings and we do not actually know any more than what appears in the evidence. 20

Following on this reluctant vendor, I would like to refer to one or two more aspects of his Honour's judgment which we submit are significantly incorrect. At pages 3159 and 3164 of the judgment his Honour indicates his view that the substance of the negotiations had concluded on 4th January. He makes it clear this finding is one of some importance in his consideration of Barton's alleged change of mind on 13th January and his final submission on 16th January. 30

One of the things his Honour says is that there was no significant change between 4th January and final deed. I have already submitted the fact that Barton said that he was prepared to agree without putting his pen to paper really meant nothing, but I want to come now only to this; to look at the difference between the draft deed and the final deed. His Honour was saying there was nothing significant in regarding that as important.

I invite the attention of your Honours to page 141 in Commercial 1, which is the draft deed. Remembering, and I do not need to say any more than that, it was a matter of vital importance and extreme urgency, this question of whether a receiver would be appointed because once a receiver was appointed this was going to be the end of everything. Everybody knew that; on both sides. Every scrap of evidence confirms that. This draft deed, which was delivered on the 6th, reflects Armstrong's instructions to Mr. Grant on what is to happen if a receiver is appointed. The deed provides for the position of a receiver being appointed between the time the deed is signed and the time settlement takes place which, of course, could in many circumstances be a substantial period of time. 40 50

The effect of the appointment of a receiver was obvious; to destroy the value of the shares in Landmark and to destroy the value of the shares in Paradise Waters, but this deed provides, if that calamity occurred, that is in a situation where both parties now know all the shares in Landmark are worthless, Barton still has to pay \$180,000 for them and when the interest in Paradise Waters is worthless, Landmark still has to pay \$100,000 for this worthless paper. This situation is provided for by clause 15 of the draft deed which is in these terms:

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"In the event of a receiver being appointed prior to settlement by U.D.C. pursuant to its securities ... be entitled to a release in respect of its covenant contained in paragraph 1."

That is the covenant to advance the \$300,000. So that what Armstrong wanted was if U.D.C. appointed a receiver Barton still has to buy his shares; Landmark has to buy the shares in Paradise Waters; the \$400,000 is still payable but the \$300,000 does not have to be advanced. Putting it into plain straight terms it means, it being indisputable the appointment of a receiver destroyed the value of the shares in Landmark and destroyed the value of the shares in Paradise Waters, that in those admitted circumstances he still had to get \$280,000 for them. I do not think anything could point more clearly to Armstrong's cynical attitude to this company and to Barton and to his powers to exact what he wanted. There, in a nutshell, is what we have been submitting.

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TAYLOR, A-J.A.: If the receiver had been appointed prior to this, Barton did not have to buy the shares. This is a provision if they wanted to go on with it they can but as far as Southern Tablelands is concerned it does not have to buy them. That is if the receiver is appointed before the document is executed.

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MR. GRUZMAN: We are dealing with a situation after Barton has put his signature on.

TAYLOR, A-J.A.: Prior to settlement.

MR. GRUZMAN: Contract today, settlement later. There is a date of settlement of 18th January. We are dealing with a document submitted on 6th January intended for signature within the next day or two and the idea being this document will be exchanged now and a settlement to take place in a week or two's time. At this stage we are contemplating, perhaps, two weeks between contract and settlement and so the deed says if during that period a receiver is appointed then you have still got to pay \$280,000 but Southern Tablelands does not have to make the advance of \$300,000. In plain straight terms that means the \$280,000 is then being paid for shares which everybody knows are completely worthless.

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This then had to come before the solicitors. One has to recollect that none of the solicitors were party to the pressure, so that between the solicitors the matter would be dealt with on a commercial or legal basis. One can imagine what Mr. Coleman, acting for Landmark, would have thought of this clause. Here he sees, everybody knowing the appointment of a receiver makes Paradise Waters worthless, that he is committing Landmark to pay \$100,000 for shares which would then be known to be worthless, and he protests.

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At page 2851 of the appeal book are Mr. Grant's notes of 9th February and when you look at page 170 in Commercial 1 you see Mr. Grant's notes of the discussions, and those notes happen to have been printed in the appeal book backwards; that is they start from 2851, there are three pages but they have gone in from the wrong order. It is perfectly clear from the fact the entries are numbered.

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If your Honours look at page 170, which is page 2851 in the appeal book, your Honours will see on 9th February Mr. Grant considered the draft documents, and then attending Mr. Coleman, and discussing documents in principle and detail; and he spends four hours with his solicitor discussing that. At page 2849, which is part of the same document, page 168 of Commercial 1, his note is "whole thing off if receiver appointed". This is what the solicitors for Landmark and Barton were requiring. At page 664 it deals with the event of a receiver being appointed. The "he" referred to is Mr. Coleman and it reads:-

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"Q. What did he say about that? A. He said his instructions were if a receiver was appointed the whole proposals were finished."

The deed that was finally settled was in those terms. The position is very simple. The draft deed of the 6th was, if I might say, completely shocking in that it required \$280,000 to be paid in the circumstance that everybody positively knew that the whole of the consideration was worthless.

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I do not think I need to read to you his Honour's judgment at page 3147. If I may say so, that is a basic misconception that there was no material change between the draft and the final deed, and it happens that we can even show to your Honours how his Honour came to make what we submit, with respect, was an error.

What happened was during the argument various documents were handed up by both sides and one document which was handed up was handed up by Mr. Staff and it was headed, "Course of Negotiation, analysis of", and it goes through the commercial matters and at the end there is, "Analysis of Alterations effected after 4th January 1967 other than matters of draftsmanship or minor importance". It goes through clauses 2, 4, 6, 7, 9, 10, 16 and 20.

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In other words, the document submitted to his Honour by the defendant inadvertently omitted the very substantial alteration in clause 15. I will make this document available to your Honours at a later stage. Your Honours will see this document reflected in his Honour's judgment; it was obviously a document on which his Honour placed some reliance.

The difference between the two clauses 15, firstly, are significant in showing his Honour was incorrect in that respect and secondly, are significant in showing the extent to which Armstrong believed that he could expect Barton to agree to anything if he expected him to agree to that.

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TAYLOR, A-J.A.: When they got around to signing the deed on 17th January with a covenant with all the other documents that a settlement would take place of the \$300,000 for Paradise Waters on the next day, they only had a period of less than 24 hours to run the risk of this receiver.

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MR. GRUZMAN: That is right.

TAYLOR, A-J.A.: You said earlier that the settlement might not take place for weeks.

MR. GRUZMAN: I am dealing with the different points of time.

TAYLOR, A-J.A.: What is the difference between the final document of 4th January.

MR. GRUZMAN: Let us take it from the point of time each document came into existence. The draft was prepared on 6th January. The draft provides in terms: it says so. It says "In the event of the settlement mentioned in para. 14 ... altered to Wednesday, 18th January, 1967" so that what was being submitted was a document to be signed now or within the next day or so, and we are speaking of the 6th, and not to be settled until 18th.

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TAYLOR, A-J.A.: The 13th at that stage.

MR. GRUZMAN: The 13th, but as submitted it was changed to the 18th.

TAYLOR, A-J.A.: Are not you saying that you cannot say there was an agreement on 4th February which was subsequently the same as the document they entered into on 17th February inter alia because of this question of receivership and it would abound him to go on and buy the shares even if a receiver should have been appointed.

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MR. GRUZMAN: No, it was altered. The original draft provided that. The original draft said if a receiver is appointed Barton has still to buy the shares and Landmark has to buy the other shares and we know settlement is not going to take place for a week or two and if anything goes wrong in that week or two they still have to buy the shares. Then

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when the solicitors for Landmark get to work on it they would not be in it. That is the point of the reference to Mr. Grant's notes.

TAYLOR, A-J.A.: What did the agreement of 17th January say?

MR. GRUZMAN: It said if a receiver is appointed the agreement is all off.

TAYLOR, A-J.A.: That is what it said on the 4th.

MR. GRUZMAN: There was no discussion on 4th January about this.

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TAYLOR, A-J.A.: If they agreed on the 4th January then somebody might become aware of the possibility of what happens if a receiver is appointed. The first draft says if a receiver is appointed Barton has to pay for the shares but Southern Tablelands does not have to pay the money. They get back to the question of 4th January.

MR. GRUZMAN: What was put into words on the 6th, according to the evidence, was what was discussed on the 4th and it amplified and could only be amplified by Armstrong's further discussions or instructions with Grant so that the document of the 6th is the first document which reflects what was thought was going to be the results of the discussions on the 4th. It is the only document in existence which deals in detail with which is to result from the agreement of the 4th.

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TAYLOR, A-J.A.: What is to result from the appointment of a receiver.

MR. GRUZMAN: Yes, and they say they sent it out on the Friday night; prepared on the Friday in a great rush, sent out on the Friday night and there is to be a discussion on the Monday which, in fact, takes place and what was obviously contemplated was this agreement would be signed, perhaps, on the Monday and it was to be signed on the basis of settlement on the 18th and there had to be provision made, according to Mr. Grant and Mr. Armstrong, as to what would happen if a receiver was appointed in the interim, which was a very likely event.

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TAYLOR, A-J.A.: Barton would not agree to buy shares if a thing was in receivership.

MR. GRUZMAN: Barton was not there. Between 2 p.m. and 6 p.m. on Monday 9th, there was a discussion. You have Grant's evidence, and it was Coleman, who was the solicitor for Landmark, who would not agree and, indeed, no solicitor could possibly agree to such a thing. For one might take it even further and say that Mr. Grant not being aware of the situation of pressure would never himself have imagined how you could possibly commercially maintain that such a clause could go in.

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TAYLOR, A-J.A.: I am right in saying as at the

4th the result then stood if a receiver was appointed it was all off?

MR. GRUZMAN: Nothing like that whatever; no evidence.

TAYLOR, A-J.A.: You are not telling me seriously before 4th January if a receiver was appointed on the 5th this thing would have gone on? It could not have gone on.

MR. GRUZMAN: That is an inference.

TAYLOR, A-J.A.: You are dealing with businessmen and not idiots. When you come to the 17th it is precisely the same thing; if a receiver is appointed the deal is off. 10

MR. GRUZMAN: At the 4th January there was no agreement.

TAYLOR, A-J.A.: If at 4th January a receiver is appointed the whole deal is off and that is precisely the position after they signed the document of 17th January.

MR. GRUZMAN: With respect, I do not agree. Our submission is when the results of the discussions on 4th January were put into legal form by Mr. Grant on the 6th it was a necessary part of the form, according to them, that if a receiver were appointed after contract and before settlement, Barton had to go on with it and they did not. 20

TAYLOR, A-J.A.: That was the proposal in the draft deed?

MR. GRUZMAN: Yes, and the significance of that is that Armstrong must have felt that he was in a terribly superior position viz. a viz. Barton to believe that that could go through, and what stood in the way of it was Mr. Coleman as the solicitor for Landmark. He was the one who, according to Grant's evidence, would not have it. It would have been, of course, a shocking agreement. In the end the necessity rather disappeared because the agreement was signed on 17th, still for settlement on the 18th, and so concerned were they that this should go through in this way that your Honours will remember Mr. Gonczi, one of Barton's in-laws, was not available to sign. At page 676, line 19, Mr. Grant gave evidence: 30 40

"Q. How did the events of the day end up?

A. Well, the arrangement was that Solomon was to come around sometime during the afternoon to go through the final matters, and he and Patterson came around at about 5 o'clock eventually, and we finally settled whatever matters outstanding were then outstanding ... certain things happened at a later point of time ... the exchange was not a proper delivery of the document ... which meant that if he signed and took the shares 50

within a fortnight that there would be sufficient compliance with the agreement."

What happened was they were so anxious to have this document executed on 17th that notwithstanding one of the parties was not available they prepared this escrow agreement which appears at page 193 of Commercial 1. It is only a very short document. It is page 2868 of the appeal book. The escrow agreement, signed by Mr. Solomon, provides:

"It is agreed ... conditional upon the board of directors of each company approving such execution and exchange and shall remain in escrow between all the parties ... within 21 days of settlement." 10

It is an indication of the concern to have this document executed on that day and at page 2871 of Volume 8 Mr. Grant's notes appear in relation to this matter, although he said in evidence at page 676, line 28:

"... there is the document I have here which was written out by Mr. Solomon, setting out the terms of the escrow ..." 20

Actually at page 196 of Commercial 1 are Mr. Grant's notes on the matter. There is no doubt these are Mr. Grant's notes.

It is consistent with Mr. Grant's notes over this period he did nothing else whatever except prepare these documents and proceed about getting them executed.

The point I was going to suggest was this: in the end this question of receivership did not become important because the time within which the receiver might have been appointed disappeared in alternations of the documents, so it ended up the contract, as it were, was signed on the 17th, for settlement on the 18th, and there was no necessity to worry very much about it. It still provided if a receiver was appointed during that interim, it was off. 30

JACOBS, J.A.: Is there any evidence this was brought to Mr. Barton's express attention? 40

MR. GRUZMAN: No, I do not think so. In fact, there is none.

I would like to come to this matter: his Honour dealt with Mr. Bovill's evidence of a conversation he had, he said, with Mr. Barton on the 13th where he said Barton said they should not go on with it, and his Honour accepts that conversation took place but he says that Mr. Bovill was mistaken in the date. He said: 50

"I accept Mr. Bovill's evidence that such a conversation did take place with Mr. Barton but I am satisfied it was earlier in the

negotiations. I do not accept any such conversation as this took place at any time from or after 4th January, 1967."

Here is the time that Barton says to Bovill, "We should not go on with it" and the Judge said "Yes, he did say this to Bovill but he did not say it at that time, he said it at an earlier point of time".

The reference to his Honour's judgment is page 3189, line 12. The reasons which his Honour gave for accepting the conversation but altering the date were these: firstly, counsel had suggested the date in examination in chief; which was correct. It was a perfectly justifiable comment of his Honour's. Secondly, that Barton had some optimism regarding the re-arrangement of Landmark's affairs. Thirdly, no step was taken to cancel the meeting with Smith. Fourthly, the version given by Smith of his recollection of the meeting of the 13th. Fifthly, the long and late conference between Solomon and Grant until 8 p.m. on 13th. Sixthly, Solomon's current instructions. 10 20

Whilst his Honour was correct in saying that I had suggested in examination to Mr. Bovill this date of the 13th, one looks to see whether there is any other evidence from Mr. Bovill of a spontaneous kind which would fix the date, quite apart from the questions that he was asked, and that is to be found in his cross-examination and not by reference to the date. At Volume 2, page 437, line 26, in examination-in-chief he says that Barton said, "It is a bad business, it is risky, we should not execute these agreements ..." Barton said, "I do not think these agreements should be signed ... that was the end of them so far as I was concerned". 30

I did not read the first part of the statement; what Mr. Bovill answered, and I had suggested to him the date of the 13th.

TAYLOR, A-J.A.: You suggested it twice on the one page. 40

MR. GRUZMAN: I did. The comment was utterly justified. Bovill said Mr. Barton said, "It is a risky business". Bovill said about the first set of agreements that were prepared, and this was not suggested by me or anybody else, and his spontaneous answer was, "Mr. Barton said to me about the first set of agreements that were prepared, 'It is a risky business'".

In cross-examination it was cleared up as to what he meant by the first set of agreements. That phrase does not appear anywhere else prior to that in Mr. Bovill's evidence; it is a spontaneous recollection of Mr. Bovill. 50

At Volume 2, page 511 he was asked by Mr. Bainton, line 12:

"Now, would you tell me to the best of your recollection when you first saw the proposed deed in written form? When did you first see the proposed deed in written form? A. I am very hazy about when I saw the proposed deed in written form. I cannot recall whether Barton showed me an outline of it ... I think it could have been when the solicitor arrived with it for execution.

Q. Prior to that had you seen any draft of the deed? A. I cannot recall seeing a draft of the final one ... it may even have been a precis also. I cannot recall it." 10

Obviously what Bovill is recalling there is the first draft deed. There only were two.

TAYLOR, A-J.A.: Why do you say it is obvious. He seems to have been having difficulty recalling anything.

MR. GRUZMAN: We can only go on the evidence. There never was anything else. 20

TAYLOR, A-J.A.: People could no doubt have notes about these things.

MR. GRUZMAN: One, with respect, cannot speculate. There is no room for speculation here. Look at the way he put it: "I think I have seen one earlier in January".

It was said by his Honour a reason for altering the date of Mr. Bovill's conversation, which he accepted, was that counsel had suggested it and all we are looking for now is to see whether there is some independent evidence apart from a date which would confirm his evidence, and hereit is. In his mind there were two sets of agreements, one early in January and one later. 30

TAYLOR, A-J.A.: You have got it the wrong way round. If you fix in a witness's mind that something took place on 13th January and fix it twice and he is cross-examined on it and knows about the 13th that draft deeds were about and he is asked if he can fix it any other way and he fixes the draft deed; what have you got to demonstrate that he went to the 13th. That is the way it strikes me. 40

MR. GRUZMAN: Over the page in cross-examination he does not mention the 13th. At page 513, line 8, he was asked:

"Were you told earlier by Mr. Barton ... there was one that was in the first week in January that I recall which was thrown out.

Q. What is your recollection of what that proposal was? A. I recall fairly similar to the one that was accepted. I cannot recall what difference there was in it. 50

Q. You cannot recall any particular difference? A. No, I cannot recall any particular difference."

Here is the independent recollection of Mr. Bovill; remembering that he was a witness whose credit was not even in dispute in the proceedings and was accepted as honest and reliable by his Honour, except, his Honour said, for his recollection as to dates.

This is not a repetition of a date. First of all, an honest witness does not agree with a date suggested by counsel if he does not believe it to be right, and even leaving that aside, he provides his own explicit evidence which we would submit is indisputable that the date of that conversation followed the first proposals in the first week in January, and that is entirely consistent with the whole of the evidence. The first week in January, 6th January, was when this proposal was made.

May I also point out that the cross-examination at this stage was not directed to this conversation. It was not the case of a witness who is trying to maintain that his evidence in chief was correct. The cross-examination just revolved around the two drafts. It was never put to him, "Did you have this conversation? When did you have it?" or anything like that. This just fell out of Mr. Bovill's evidence when his mind was not directed to the subject.

We would submit there is no justification for his Honour Mr. Justice Street to suggest this evidence of Mr. Bovill's occurred weeks earlier than Mr. Bovill swore. Indeed, his Honour puts it back before Christmas which we submit is completely consistent with everything. His Honour having accepted the conversation did take place, it only being a question of when it took place, there being cogent and concrete evidence that it must have taken place after the 9th -- certainly after the 6th -- the most likely view is that it took place when Bovill said so and, of course, that becomes a matter of extreme significance in evaluating the whole of the evidence.

The second matter his Honour mentions on that point is Barton's opinion; but when you contrast that with Smith's opinion and Armstrong's opinion and what Smith said on the 13th about finance from U.D.C., that is a point fairly important to establish that fact.

In Smith's evidence about the meeting on Friday 13th, this appears in the judgment of his Honour at page 3191 and he says that Smith says, I think in his evidence-in-chief:

"Q. Was anything more said of the discussion of Friday 13th ... we are making progress with the investigations."

A little further up the page it reads:-

"Mr. Barton stated that in his view the dividend should be paid. He said he was quite confident after Armstrong was out of the company he would have no trouble getting money out of U.D.C."

That was Smith, who had been in touch with U.D.C., and knew the affairs of the company.

The next matter his Honour takes into account is the 'phone call between Bovill and Barton which he accepts as taking place. This is at page 3196, line 23. That is the conversation his Honour said that in his view the dominant theme of the conversation was the commercial necessity of getting Armstrong out of the company, "rather than Mr. Barton's will had been overborne by Mr. Armstrong's threats ... and to yield to Mr. Armstrong's demands". 10

Again he accepts that telephone call took place but he finds and believes the conversation was somewhat different to what had been put. But if one regards Armstrong as not being a reluctant vendor but rather a frantic vendor that again would alter his Honour's view on this conversation. The other factor to be considered is that however bad Barton regarded this contract to himself and to the company he still had to persuade both of them to enter into it, because one would gather from the evidence that Bovill, whilst he would be guided and influenced by Barton, would still have to believe there was some commercial basis behind it. 20 30

One of the other matters his Honour mentioned is that Barton's instructions to the solicitors were not changed. One would hardly expect that if Barton was contemporising and hoping against hope that something would happen and not forgetting that Barton never regarded himself or anybody else as bound until the final signature of himself and the other people, and Barton never so regarded it.

Smith, on the 13th, the day after Armstrong executed the documents, he was still saying to Bovill that he hoped the negotiations would be successful. That is his evidence-in-chief; spontaneous. 40

Again on this reluctant vendor, your Honours will remember Mr. Grant's evidence about the third 'phone call on the 17th where he says for the first time it would appear Armstrong was suggesting the possibility that Smith would not take the chair. We know from all the evidence however that error crept into Mr. Grant's evidence; an error it was; an error it must have been, but this is one of the matters his Honour regarded as significant, and we submit it is of some vital importance that your Honours should put into proper perspective Mr. Grant's evidence and Mr. Grant's notes of 17th January and should recognise however it occurs it is important that Armstrong was saying for the first time on the 50

17th, "I might not go on with this, I will have to reconsider it because I now face the possibility that Smith will not go on at all".

That is a matter which your Honours should completely put out of your minds. That is a matter which his Honour took into account and to that extent creates an imbalance in his Honour's judgment.

I was about to say having in mind that conversation and then all these other factors which his Honour took into account, and on the basis of which his Honour rejected the conversation of the 16th, it is our very respectful submission a rejection which is based on premises which have been demonstrated to be incorrect that conversation must, in our submissions, logically be accepted in the same way as the one on the 12th. 10

At page 3193 in considering his rejection of Friday 13th as the date of the Barton/Bovill conversation, his Honour said:

"Mr. Smith gave a qualified denial of Mr. Barton's claim in that he identifies a conversation to which Mr. Barton refers as being on Wednesday 11th ... the contracts were very complicated." 20

What his Honour has not referred to is the preceding part of Mr. Smith's evidence which appears at page 628.

JACOBS, J.A.: The conversation between Mr. Barton and Mr. Smith appears at page 3187.

MR. GRUZMAN: I am taking your Honour to the actual evidence of that. At page 628 Volume 3, if one starts at line 19, there is put to Mr. Smith in his evidence-in-chief as follows: 30

"Q. Did Mr. Barton say to you 'I am not prepared to sign or exchange the document on behalf of myself and also I am not prepared to advise my co-directors on behalf of Landmark Corporation to do so.'"

That is what Barton said on the 13th. It was put to Mr. Smith: "Was that on 13th?" and he said, "This is where my recollection differs from Mr. Barton. My recollection is that this conversation was on the Wednesday". 40

It does not matter from this side of the case whether it was on the Friday or the Wednesday. The point is at some time after the draft deed Smith is saying there was some such conversation; "I recall him saying that the document had to be studied by the solicitors. He had two sets of solicitors ... in principle it was O.K. but the contracts were very complicated". That is why his Honour refers to it as a qualified denial. We would put it in substance as a qualified admission 50

that some such conversation as Barton alleged took place.

He says in precise terms, "I believe the conversation stated would have taken place, but my recollection is that it was Wednesday and not Friday or words to that effect". That appears at line 35 and it continues:

"... the statements of the conversation occurred on the Wednesday rather than the Friday, but they do not follow the exact words I said to Mr. Barton." 10

The significant part of the evidence is:

"I believe the conversation stated would have taken place"

and the conversation stated was,

"I am not prepared to sign or exchange the document on behalf of myself and also I am not prepared to advise my co-directors on behalf of Landmark Corporation to do so."

Here is complete confirmation from Mr. Smith that some such conversation with Mr. Barton took place; he is supported by Mr. Bovill, and the reasons ascribed by his Honour for altering the date of the conversation with Mr. Bovill are not correct. 20

JACOBS, J.A.: In one way it would be better if it had occurred on 11th.

MASON, J.A.: That would give Mr. Armstrong motive.

JACOBS, J.A.: That was not the way Mr. Barton was putting his case.

MR. GRUZMAN: That is true, but from the point of view of an evaluation of the evidence whether it is the Friday or the Wednesday is not significant. On the 6th the draft was submitted, on the 9th the draft is considered. At some time during that week Barton turns against it and if he said to Mr. Armstrong on the 12th, "I won't be blackmailed into this agreement", how much more likely that he would say to Mr. Smith, "I am not going to sign it" and he would say to Mr. Bovill, "I am not going to sign it". 30 40

TAYLOR, A-J.A.: Would you repeat that?

MR. GRUZMAN: How much more likely that he would say to Mr. Smith, "I am not going to sign it" and to Mr. Bovill, "I am not going to sign it". His evidence is utterly consistent and the suggestions that he tells Armstrong he is not going to sign it and tells the others that he was, we would submit is without foundation.

At page 3194 of the judgment his Honour refers to the fact he finds Barton's willingness to 50

enter into the agreement continued uninterrupted at all times after 4th January. That simply cannot be correct; his Honour's own finding that as at the 12th at least there was a complete interruption when he said, "I won't be blackmailed into it" and on an analysis of the judgment itself it shows that cannot be correct.

JACOBS, J.A.: The blackmail conversation, that was earlier?

MR. GRUZMAN: This is after. 10

JACOBS, J.A.: The 16th?

MR. GRUZMAN: 12th.

MASON, J.A.: This is the conversation with the plaintiff in his office at Manly?

TAYLOR, A-J.A.: His Honour accepted that conversation.

MR. GRUZMAN: Yes. What he is saying as at the 12th, after the first draft, after everything, that he signed the documents on that day, Armstrong, but Barton still has not signed; Barton is still talking about solicitors and Barton has not signed and his Honour accepts that in those circumstances, he having already signed the documents, he rings Barton and says, "You sign the document or else", and Barton says, "I won't be blackmailed into it" and his Honour believes that; and he says Barton says that he not only told Armstrong but to Bovill, who confirms it, and to Mr. Smith, who confirms it. 20

Smith said he was told on the 11th. Barton said he told Smith on the 11th. Whichever it is it does not matter very much. It is indisputable during those few days of that week Barton was in a frame of mind that he was not going to sign, and that is accepted by the learned trial Judge. Something happens - something happens on any version - between 12th or 11th, or does not matter, but as accepted by his Honour, something happens between 12th, where he won't be blackmailed into it, and 17th, when he puts his pen to paper; and the question is what happened? 30 40

TAYLOR, A-J.A.: You are not saying you start on the basis as at the 12th he said, "I will not sign, I am never going to sign, the whole thing is off"?

MR. GRUZMAN: That is right. That is his evidence.

TAYLOR, A-J.A.: It is one thing to say "I won't be blackmailed into this" and it is quite another thing to say, "This is finished, it is never going to happen". I do not get the impression that Mr. Justice Street ever decided this question of what happened in those days, I gather he decided this on the whole course of conduct, that Barton wanted Armstrong out of the company. His Honour had the view that really says before there were any threats 50

these people had this row and from then on Barton wanted Armstrong out and Armstrong wanted Barton out and they both knew that no company could survive when they were spending all their energies fighting. Eventually it came to the position where Armstrong could not get Barton and Armstrong realised he had to go, to get out himself. I never read this as a judgment where up to 12th January he would not sign; that he had desisted up to then and all of a sudden he is overcome. How the two things stand together, is, I think, the crucial question.

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MR. GRUZMAN: May one assume everything your Honour puts is accurate on the evidence, but where is the justification?

TAYLOR, A-J.A.: That is how I read Mr. Justice Street's judgment.

MR. GRUZMAN: I understand. Let us suppose Barton wants Armstrong to go.

TAYLOR, A-J.A.: That is a fact.

MR. GRUZMAN: But not with all the partners. That is a real problem; not the fact one or the other was to go.

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TAYLOR, A-J.A.: That was the basic decision that both men had made.

MR. GRUZMAN: I would agree, but it is the manner of the going that we are concerned with.

TAYLOR, A-J.A.: Prices have to be paid.

MR. GRUZMAN: The question is if the matter was going to be settled amicably or commercially.

TAYLOR, A-J.A.: The question of it being settled amicably disappeared in May 1966.

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MR. GRUZMAN: Commercially. Why was the necessity to use threatening conduct; that is the real question for the Court. Why was the necessity, and secondly, look at the result. Look at the unrighteous result, and there is your answer.

Referring to the particular matter that gave rise to this: Why did Armstrong threaten him on the 12th, at that late stage? I will deal with that in a moment.

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I was referring to the fact that at page 319⁴ his Honour referred to Barton's willingness to continue in the agreement uninterrupted at all times, in our submission that is not right. In his Honour's judgment, and in any event Barton's expression of willingness meant nothing in this context until there had actually been signatures.

JACOBS, J.A.: Not all of this is consistent with Mr. Barton's evidence. If Mr. Smith is correct that the conversation took place on the 11th, the

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course of events is apparently Mr. Smith conveyed Mr. Armstrong's message that the agreement had to be signed on the 13th and Mr. Barton demurred to that, and on what you have been putting to us, said not only what Mr. Smith particularly said but also said the earlier part of the conversation. Then on the next morning he gets a ring from Mr. Armstrong when he is at the Landmark office and is told to sign the agreement or else.

JACOBS, J.A.: That means that the conversation with Mr. Bovill would not have taken place on the 13th, the one that his Honour said he was satisfied took place at some time but not on the 13th. On that view his Honour would have been correct and it would not have been the 13th. 10

MR. GRUZMAN: On Bovill's evidence it must have been after the 9th although it does not accord with Barton's evidence but it seems to accord with Smith's evidence as to the 11th.

I had set out this morning to invite your Honours' attention to all of the matters in his Honour's judgment as to which we respectfully ask your Honours to make different findings. We have prepared a document headed "Findings sought by the appellant in this Court" and I now hand up three copies. (Produced to Court.) Mr. Powell's copy is not available yet but it will be shortly. 20

JACOBS, J.A.: I think this will be useful and thank you very much. I did not think you were going to put in all the findings on credit and otherwise. Speaking for myself what I would have found of the greatest assistance would have been the steps in the analysis of it as findings of fact and conclusions of fact which led to the ultimate finding. You deal with them, of course, the whole time. We have just been dealing with one now, a very important one. These are what I would describe as the findings. These are the steps on the way when you talk of the credit of Detective Sergeant Wild and Constable Follington. 30 40

MR. GRUZMAN: That is a short list of what we say are the vital ultimate findings.

MASON, J.A.: I think you can extract those findings, from this statement as a separate document, and if you could do that it would be very helpful.

MR. GRUZMAN: We shall do that.

JACOBS, J.A.: I can give an example. The one at the bottom of the page is one of the essential parts in your argument. It is that type of submission, so that we can see them, one after the other and how many there are of them. It is findings like that in contrast to the first on that page, although I think it is very important to your submissions but it is peripheral to the essential findings. 50

My brother Mason points out that page 3 comes into the category of findings of ultimate

fact which you want to be reversed or what you want the ultimate conclusion from the facts to be reversed and need them to be reversed before you succeed.

MASON, J.A.: Actually, as you read on in this document, Mr. Gruzman, it seems to improve with acquaintance. It seems on the first page the authorities deal with the finding of credit, and later the findings mentioned seem to be of fact.

MR. GRUZMAN: Exactly. A chronological examination is made of the judgment from that point of view. 10

JACOBS, J.A.: I would like to recall my previous comment, and would like to have a closer examination of this document. It may be that the first page is not a very good example.

MR. GRUZMAN: What we have endeavoured to do is to omit argument. I have spoken to your Honours this morning some time about the conversation with Bovill and this document only occupies two lines with the conversation with Bovill that took place on the 13th January. 20

MASON, J.A.: I would like to join in with what the presiding judge said, that the document may very well be what we have in mind.

MR. GRUZMAN: Mr. Horton and Mr. Purvis, your Honour, would both be pleased to hear that.

I would now like to go to a matter which is pretty crucial to these proceedings and that is the effect of the facts on Barton's mind. I think this is the last of the factual matters I propose to deal with. There is no doubt, of course, during the course of negotiations for, and at the time of the execution of, the contract Barton was - in his Honour's words - in a real mental torment and genuine fear. Three questions arise: (1) What was Armstrong's intention in his course of conduct? (2) What did Barton believe was Armstrong's intention? (3) What was the effect on Barton in relation to the negotiations for and the execution of the contract? 30

As to Armstrong's intention, it has been shown during the argument on the commercial aspect that in the circumstances Armstrong stood to make an enormous loss. His financial advisor and his solicitor apparently agreed in the belief that unless he could make an agreement with Barton he would suffer heavily and the agreement with Barton was worth some \$700,000 to him. This provides an obvious motive by Armstrong to threaten Barton. 40

His Honour Mr. Justice Street says there were antecedent threats, not related to this agreement, and therefore declined to draw the inference that the threats were related to the agreement in question. However, all the threats were in the context of the commercial aspects following the removal of Armstrong from the Chair of Landmark. 50

TAYLOR, A-J.A.: You mean there were no threats before 17th November?

MR. GRUZMAN: The 'phone calls started then. The course of conduct of what I might term the reign of terror started precisely from the date that Armstrong was moved from the chair and continued uninterrupted until the agreement was signed and, indeed, thereafter.

MASON, J.A.: You have to face up to one aspect: there is evidence, of course, that the watching of the plaintiff may well have commenced prior to 19th May because the plaintiff swore in chief that he had reproached Armstrong on 19th May with having giving instructions to people to watch him. 10

MR. GRUZMAN: This does not refer to watching, as it were, by Hume or anything like that.

MASON, J.A.: It just refers to watching generally?

MR. GRUZMAN: Spying, I think, is the ultimate word; namely, to find out what Barton is doing in the company. A sort of, perhaps, not very happy situation that could arise in the company. I do not think anything of a criminal nature is suggested - no watching with intent to do harm. 20

MASON, J.A.: I thought the allegation was "you have given instructions to people to spy on me".

MR. GRUZMAN: That is true. Whilst it does appear, and there is evidence about it, evidence which we ask your Honours to accept, that Armstrong had instructed Hume to watch him - which we regard as being of a criminal nature - probably some time in October, and indeed Barton's view was, in his conversation with Inspector Lendrum, that Hume had been engaged to keep a tab on him in July. But the fact is so far as threats directly from Armstrong to Barton are concerned, they commenced exactly when Armstrong was removed from the chair - not before at all - and thereafter continuously. 30

So it is on that basis that we submit that all the threats - and by threats I mean threats - were in the context of the commercial problem arising from the removal of Armstrong from the chair of Landmark. This removal automatically brought about a situation where Armstrong became entitled to and did in fact call up the \$400,000. 40

TAYLOR, A-J.A.: Which of the Armstrong companies was that, George Armstrong or Southern Tablelands?

MR. GRUZMAN: George Armstrong first and then there was the repayment of \$300,000.

MASON, J.A.: Southern Tablelands had a loan of \$50,000 which was secured on the second mortgage on top, but the purpose might have been to finance Paradise Waters development, but one does not know. 50

MR. GRUZMAN: That is true.

TAYLOR, A-J.A.: There is an earlier reference at page 47 to Barton saying that Equity proceedings were started by Southern Tablelands. Is that a mistake in his part?

MASON, J.A.: I think it is a mis-direction on the plaintiff's part. He was referred really to the originating summons in the equity suit, which was a proxy battle and Mr. Armstrong wished to have his right to enforce the appointment of these directors on the board of Paradise Waters and sought ancillary relief in connection with those proceedings to prevent Landmark dealing with the assets of Paradise Waters, except in accordance with the rights he was seeking to enforce. It was not an absolute injunction against U.D.C. 10

MR. GRUZMAN: Yes, indeed, and he was cross-examined by Mr. Staff to suggest the names of the wrong company. Perhaps not a lot turns on that.

At first Armstrong believed that he could safeguard his position by securing control of the Board and the threats of that kind were designed to weaken Barton's position and put him off balance, thus reducing his desire to oppose Armstrong at the general meeting, and his ability to organise and to oppose him at the general meeting. Clearly the purpose of the threats was the desire to safeguard and benefit himself commercially in the particular situation which then existed. After the general meeting there appears to have been something of a lull, but with the reversal of U.D.C. the threats continued and, as we have shown, from 22nd December activity of a criminal kind was put into train. At that stage the proposals of the 14th December were not subject to current negotiations having been interfered with by U.D.C.'s proposal to appoint a receiver but the object of the employment of Vojinovic was to ensure that some such agreement came about. The course of the conferences of 3rd and 4th January indicate a sense of urgency with the prospect of the appointment of a receiver ever present and Barton's apparent agreement meant anything. The telephone calls continued, obviously with the intention of coercing Barton into the agreement. The employment of Vojinovic at considerable prospective expense, whether for the purpose of killing Barton or further frightening him was obviously related only to the commercial aspects of Armstrong's affairs. When the killing of Barton failed his last remaining hope was to ensure that the contract was signed before the receiver was appointed and the finding of Street, J., that thereupon Barton, in relation to the contract - this is the very contract of 12th January - this puts beyond question that the real purpose of the terror at that time was the making of this agreement. 20 30 40 50

It is entirely inconsistent that when Barton had still not signed, and whereas Armstrong had signed on the 12th, that he further threatened Barton

on the 16th with respect to the agreement. It follows that evidence shows that the object of Armstrong's threats - by Armstrong's activity - was then to kill Barton for commercial gain or to reduce Barton to a state where he would make whatever agreement both on his own behalf and on behalf of Landmark that Armstrong wanted.

On the whole of the evidence, if one thing is clear beyond question, we submit that it is that Armstrong by his threats was seeking to advantage himself in his fight with Barton - to commercially advantage himself. We submit that his Honour's finding at page 3137, line 10, which I will read, is incorrect: "... that the threats were intended to cause Mr. Barton to weaken his position ... Mr. Barton". Firstly we submit that your Honours should find on the evidence that the object of Armstrong's conduct throughout was to advantage himself against Barton in whatever commercial situation might from time to time develop. His Honour's further finding: "Whatever may have been the reason for this conduct on Mr. Barton's part ... challenged in the suit". We submit that, that finding is wrong. Indeed, the next few lines of his Honour's judgment possibly in themselves provide the answer to his Honour's earlier finding, when he said that is of assistance to Mr. Barton "in that they establish this frame of mind ... susceptible of being intimidated". That is one of the matters on which we will enlarge, that his Honour found that Barton was conditioned to being intimidated by Armstrong.

TAYLOR, A-J.A.: Do you mean by that he had become impervious?

MR. GRUZMAN: Not impervious, just upset, and I will come to the matter in a moment. I will invite your Honours' attention to this passage: "that they establish ... susceptible of being intimidated".

Secondly, I would like to come to the question of what was Barton's belief as to Armstrong's object: Barton's employment of a bodyguard prior to the general meeting and association therewith, his retailing to Inspector Lendrum of the general business affairs of Landmark and his accusation that Armstrong was behind the matter in a commercial sense, Vojinovic's statement, his conversation with Bovill, his leaving his home and returning immediately after the signing of the agreement - all these things point conclusively to the finding that Barton in his mind related the threats and terror of Armstrong to Armstrong's attempt to kill him, as intended to disadvantage Barton with respect to the commercial aspects of his relationship with Armstrong.

Again, Barton's specific statement on 12th January - accepted by the learned trial Judge - that he would not be blackmailed into making this agreement puts beyond any doubt any suggestion that he did not associate in his mind Armstrong's

threats with an intention to force him to enter into an agreement which he did not want. Although I am not going to say a lot more about it, the evidence in my submission is so cogent on both of these matters - namely that Armstrong's conduct was intended to advantage himself against Barton and Barton knew it - the evidence on that is all one way and in our submission such findings should be made.

The next subject is the effect of the threats on Barton's mind and I am just going to, if I may, read two or three lines from his Honour's judgment with which I will deal later. First of all I will read a passage from Edgington v. Fitzmaurice, 29 Ch.D 459, which says "The real question is what was the state of the plaintiff's mind and if his mind was disturbed by the mis-statement and such disturbance was in part the cause of what he did, the mere fact of his also making a mistake himself could make no difference. If the false statement actually influenced the plaintiff ... the defendant is liable". That is the way in which it is put. "The rule is: what was the state of the plaintiff's mind, and if his mind was disturbed by the mis-statement and such disturbance was in part the cause of what he did" - that is the way we submit generally this case we make should be understood.

Another very short passage from Reynell v. Sprye, 42 E.R. 710, where one party induced another to contract on the faith of representations (read).

JACOBS, J.A.: There seems to be a little implicit in that, there must be some inducement, but that passage does not say so.

MR. GRUZMAN: Not in that particular passage, but it says once it has been made out that there has been anything like deception, no contract rests in any degree on that. Then it goes on to say it is impossible to analyse the operation of the human mind as to be able to say how far any particular operation play part in a resolution - (read).

The next one is in Re Imperial Mercantile Credit Association, 1869 L.R. 9 Eq. 223: "Equity is not in the habit of considering that a falsity is not to be looked at because if the truth had been told the same thing might have resulted".

When we come to this question of the effect on Barton's mind, on our submissions now what we are looking for is not a complete over-bearing of the will. What one is looking to see is whether Barton's mind was affected to any extent. When I come to examine the law with your Honours, one of the threads which seems to run through the cases is the impossibility or the difficulty of determining what was operating in a person's mind, and the law stepping in and saying in the given situation because of the very reason that it is so difficult, therefore the law makes an assumption. However, what I am going to do now is to endeavour to make a few

submissions on the factual side of the effect on Barton's mind, rather than legal submissions at this juncture.

There are two possibilities, I suppose. One is his Honour's view that accepting a real fear, that the human mind is such that it can concrete-off that compartment so it has no effect on the rest of the mind. At the other end of the scale, if a man is in a state of fear then it must affect him wholly.

The problem here to see just the - and I do not propose to go into this in detail - reasons, quantum and fear, which have been recognised by the evidence here. I do not propose to enlarge on that in any way. These are not trifling fears, they are real fears, and to consider whether they would affect the cold, dispassionate contracting mind that a person is entitled to have when he enters into an agreement. 10

Barton, by the evidence, appears to have been a capable business man - handling the affairs of a large company without apparent difficulty. Nevertheless, it is quite apparent that Landmark's affairs --- 20

TAYLOR, A-J.A.: What do you mean by that; without difficulty to him or to the company?

MR. GRUZMAN: Without difficulty to anyone.

TAYLOR, A-J.A.: There was considerable difficulty with the company. They were having difficulty with their contractors.

MR. GRUZMAN: The company was dependent largely on loan moneys, in its mortgaged company and otherwise, and there is no doubt that it required considerable dexterity to have the company managed nicely so as not to borrow too long, or to borrow short and lend long and that sort of thing. Those are matters that had to be considered in the daily affairs of this company and there is no doubt when Barton went overseas they found difficulty and when Barton came back he was able to clear it up. All I am putting is that Barton was revealed by the evidence to be a reasonably competent businessman and, up to the time of this, was running the affairs of the company in a way which appeared to have been satisfactory. I think one can adduce from the fact that U.D.C. were prepared to at least consider and then give further consideration to advancing this amount of money in connection with Armstrong demonstrates there was confidence in Barton as a businessman at that point of time. So we submit it is fair to say that Barton is revealed by the evidence as a reasonably competent businessman in the affairs of the company which he was running. 30 40 50

Secondly the company did require pretty considerable attention, as the evidence shows. There is no doubt that the decision to remove Armstrong from the Board for the good of the company, inducing

U.D.C. to agree to provide the necessary funds, the preparations for the general meeting, the subsequent debacle with U.D.C. when it changed its mind and the matters associated with that, all these would in themselves have been mentally exacting and fatiguing to anybody, there would be considerable tension.

The first submission on this is that at the time that Armstrong's conduct commenced and during the period of its continuance there were factors operating on Barton's mind which made him even more susceptible to influences of this kind than perhaps would normally have been the case.

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JACOBS, J.A.: Because he was working hard?

MR. GRUZMAN: I will come to the question of fatigue, actual mental fatigue.

JACOBS, J.A.: Where does he say that he was fatigued?

MR. GRUZMAN: It is a matter of interest. The work he was doing and the force that he was taking at the time - one need go no further and say that the Court could well draw the inference that he - having committed the company to the removal of Armstrong on the basis of the U.D.C. promise and then seeing the company fall to pieces - primarily, perhaps, because of what U.D.C. did and ultimately because of what he did - one might well say that he would be experiencing some sense of responsibility and concern - what I would call fatigue - as well as the fact of having to do all these things and running the affairs of the company.

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JACOBS, J.A.: Unless he said that he was in that condition I would think that to ask us to draw that inference would be more or less speculation. You might say that the Prime Minister is constantly in this condition. On the contrary perhaps politicians have a resilience that we have not in order to live with it. It seems to me that Mr. Barton, if we are going to draw any inference from the events, was in such a situation that you draw the inference that he had resilience. Here was, on the one hand, a financial giant, a person who held all these securities through his companies, and he was prepared to push him out. If that shows fatigue, it is a funny way of showing it. It is the same with political figures, that things which would ordinarily distress and overwhelm the ordinary man do not affect them in the same way. It just depends on how you look at it.

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MR. GRUZMAN: The only point I make it that one's capacity is finite, it is not infinite and if a person, for example, was able to do these things without anything to worry them, that is one thing. But if a person is otherwise under strain - as, for example, the Prime Minister - it might take only a small amount of fear to have a greater effect on him than if one were of a more relaxed mind.

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JACOBS, J.A.: One could not stop you putting an argument of this kind, but if that is the position you might consider the present President of the United States.

MR. GRUZMAN: You have Armstrong's reign of terror commencing on about 17th November and Barton's decision to employ an armed bodyguard 24 hours a day does reflect the deep and abiding fear he had. It is significant that Armstrong's threats and the employment of the guards were not disclosed at the general meeting or otherwise used by Barton in any way. They evidence a fear known only to his family and to his co-directors. The effect of that period was to condition Barton to experiencing fear at the hands of Armstrong so that each application of fear would produce a greater effect. It is the same sort of thing where one can get to the stage, as we know, that it is said that the mention of a particular man's name may be said to inspire fear in some people.

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TAYLOR, A-J.A.: Mr. Barton's usual answer to the 'phone calls at 4 o'clock in the morning was that they ought to be in Callan Park.

MR. GRUZMAN: On one occasion he said, "You ought to go to Callan Park".

TAYLOR, A-J.A.: Do you mean he only said it once?

MR. GRUZMAN: No. I think he only said it once - according to the evidence.

TAYLOR, A-J.A.: I thought that was his stock answer.

MR. GRUZMAN: It is hard to know what one would say at 4 o'clock in the morning to a 'phone call that said "You are going to be killed". Unfortunately we do not know the effect of them on him.

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TAYLOR, A-J.A.: You have the finding.

MR. GRUZMAN: Yes. I am only looking at the fact of the quantum that he had. The effect of this fear in a particular situation has not been examined by any authority. There is no case one can look at, but it is permissible to consider the effect of fear on the ordinary human mind as experienced in other situations. Logically one can look at experience in the Services when large numbers of men are subjected to fear for a substantial period of time and their reactions may be observed. Some people may have first-hand knowledge of this and it is the subject of ordinary human experience. This is not the case of dealing with precise amounts, but of the ordinary mind exposed to fear at any time of war.

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It is in these circumstances that we invite your Honours to look at this book "Battle for the Mind" upon the basis that it relates to human experience, experiences which are ordinary, and it relies on ordinary people exposed to stress. One

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of the significant matters referred to there is the time element, the effect of a given period, and we would not like it to be thought (A) I would not be entitled to and (B) I do not seek to equate Barton's position precisely to any other circumstances. That will be a matter for your Honours. But it is permissible, if I may use the expression again, to place in the judicial computer as one of the many factors to be considered in a case of this kind - what happens to people who are subjected to stress?

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TAYLOR, A-J.A.: Are you saying that we can look at this book and treat it as a recognised scientific work? That is what we are limited to, is it not?

MR. GRUZMAN: Your Honours are limited to - I think the expression is - "Those works which a well-read gentleman would read". In other words, I think ---

TAYLOR, A-J.A.: It is a matter of medical science is it not?

MR. GRUZMAN: There are certain aspects. For example, if you were dealing here with an accountancy case you would take a book off your shelf which was an accountancy text book.

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TAYLOR, A-J.A.: So long as it is a recognised one.

MR. GRUZMAN: Not necessarily. There is no criterion. In other words, I will show your Honours the authorities to say it would be proper for your Honours to take off the bookshelf an accountancy text book of any kind, really, and look at it and say "I understand from that so-and-so", and refer to it in the judgment.

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TAYLOR, A-J.A.: I do not think you can base a finding on that.

MR. GRUZMAN: Yes. I will refer your Honours to one or two authorities on it, and without taking a lot of time I will give your Honours reference to the cases: Redbank Meat Works Pty. Limited v. Commissioner of Taxation, 69 C.L.R. 315 whereat page 324 Latham, C.J., refers to the Australian Manual of Accountancy and Commercial Law on the question of what is a reserve fund; Frankston & Hastings Corporation v. Cohen, 102 C.L.R. 607 at 617 where Fullagar, J., refers to the Practical Audit, and of course it happens that one deals with that sort of book because they are common in that sort of case; Stoddart v. Deputy Federal Commissioner of Taxation, 42 C.L.R. 106 where counsel for the appellant referred the court to Spicer & Pegler, Practical Audit, and at page 117 Isaacs, J., said "The nature and the whole operation ... published 1910".

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TAYLOR, A-J.A.: You want us to go further than that. As I understand it, you want us to read the book and say this is what happens in the mind of a man if he is threatened and thereupon make a

particular finding that we think that is what happened in this case.

MR. GRUZMAN: No, I am not. All I am putting is that it has always been the case that the Court can inform its mind of matters generally.

JACOBS, J.A.: The simplest one in the present context is that fear frightens. We take judicial notice of that fact, and that greater fear frightens more.

TAYLOR, A-J.A.: And it varies from individual to individual. 10

MR. GRUZMAN: Yes, and the next point is what effect does the fright have on the mind.

JACOBS, J.A.: That might be a different subject.

(Luncheon adjournment.)

MR. GRUZMAN: Before the luncheon adjournment I was dealing with this matter, but prior to inviting your Honours to read, might I refer to the book "Battle for the Mind"? There is one precedent, Davies v. Perpetual Trustee Company, 1959 A.C. 439, in which your Honour, Mr. Justice Jacobs, in the Privy Council - with my learned friend Mr. Horton's junior, referred the Privy Council to the Encyclopaedia Britannica and to the Australian Encyclopaedia. I am told that the Australian Encyclopaedia at that time had only been published six months and, indeed, went out of print shortly afterwards, being unsuccessful. That was accepted by their Lordships in the Privy Council - that your Honour could refer to it. I am told that Sir Garfield Barwick referred them to the Daily Mirror, but I am not going to rely on that. Here the Australian Encyclopaedia was referred to the Privy Council and it could not have had any recognition in the real sense since it had only been published six months. 20

TAYLOR, A-J.A.: It all depends on the purpose for which you are referring to it. If you look at that decision of Fullagar, J., he was concerned with the question of whether an auditor appointed not by the council but by the Government could be sued for negligence and referred to that book, technically, for the purpose of making up his mind of what an auditor does. Here you are not referring us to this book to decide what a man does when he is subjected to threats and how he feels, because that is something we know about. Everyone knows about being frightened and fear. It seems to be that you are referring us to this book as to the views on what a man might be caused to do. I do not think that is permissible. 30 40 50

MR. GRUZMAN: In the case to which I referred I think his Honour the presiding Judge was involved in showing what a Presbyterian was.

JACOBS, J.A.: That is the meaning of words, given

contemporaneously, and you could refer to a contemporaneous authority. You could go to a dictionary for the meaning of words.

MR. GRUZMAN: In other cases, for example, they referred in Fraser's Case, 46 C.L.R. 343, to Adam Smith's "Wealth of Nations" on some economic matter.

TAYLOR, A-J.A.: I can understand that where there was a question of a particular economic theory or philosophy.

MR. GRUZMAN: In Darby v. Ouseley, 156 E.R. 1093 at 1096, Chief Baron Pollack said (read) and at pages 1097-8 refers to Lord Ellenborough in Rex v. Payne (read). That appears to be the general principle, and that is why I prefaced my remarks about this book by saying I am not going to ask your Honours to find facts upon this basis, but I did say that the matters contained in it were matters which your Honour would take into account with all the other factors and all the other considerations which might come to mind. Bearing in mind, as the High Court said in The Transport Case, 99 C.L.R., in the joint judgment of Dixon, Kitto and Taylor, JJ., at 119: "One is the content and the nature of the literature and the other concerns the characteristics of the persons themselves ... whether supposedly expert or not". So it is confided to justices to make decisions on human nature and how human beings will react in given circumstances, upon the basis of their knowledge and experience. 10 20

It is, in our submission, permissible to - shall we say - fortify the general knowledge and experience of the Court by reference to the opinions (as Pollack, C.B. said) of eminent men on this subject, but not to prove facts and not to invite a direct analogy, with the examples shown in that particular case, but to invite the Court's attention to the principles. Otherwise there is no legitimate way in which all the body of other people's experience of these matters would be brought before the Court. You cannot bring evidence of it, and if you cannot refer to books that is so. Therefore we submit it is proper that your Honours should look at this book as a work which gives some idea of what in some circumstances some people do when they are faced with fear. 30 40

I do not propose to spend a lot of time on it, but only to refer to the fact that Dr. Sargeant is a man with an excellent record. He is still today the physician in charge of the Department of Psychological Medicine at St. Thomas' Hospital, London and has had a very distinguished career. In fact I telephoned him in case his evidence may become necessary but you cannot bring evidence as to these things. But the general effect of what he says is that it was found, for example, and he details the findings and the overwhelming influence fear of death and of continued stress on the development of combat exhaustion. He quotes that after a period of efficient combat there appears first 50

evidence of combat exhaustion and the men become unable to distinguish various noises and so on. He said that tension resulting from a prolonged exercise of courage was a most important element in the development of emotional exhaustion and combat exhaustion may appear, in his view, 15 or 20 days or as many as 40 or 50 days - he has put it as approximately 30 days with the majority of men. He refers to injured soldiers and their neurotic impressions, and these may be the exception, because he said the exception to the rule are the neurotic or insane soldiers. He says that a soldier becomes the subject of combat exhaustion if he is exposed to stress for long enough. 10

JACOBS, J.A.: I do not propose to take time here, but the real difficulty is that if Mr. Barton had said, "I was in a state of utter exhaustion", then you can use that because that accords with what you might imagine it would be. Or if he had said that, he could have been cross-examined to show that was not a case of exhaustion, and you might be able to rely on that, I am not saying you would or would not, but in the absence of anything of that kind this does not carry you to the factual situation of the present case. 20

MR. GRUZMAN: The problem is this, that the man concerned does not know. This is something which the person's reactions - something of which he may be himself unaware - themselves are important in relation to this type of stress. The reaction is there but if you ask the man himself he might say "I am perfectly normal", but he would not be. This is the real significance of it. Might I say it is important, and I really invite your Honours' attention to what does happen to the average individual. Any one of these soldiers would not say "I am suffering from combat exhaustion". They would say, as happened in the case that happened, "I am a perfectly efficient soldier", until eventually they broke down and cried or did something stupid. We are not suggesting that Mr. Barton got to that stage but there is some evidence here about the effect, and it came in by a side wind and I will read it to your Honours in a moment. It is significant, I suppose, that according to the findings here, after 60 days in combat the average soldier will be emotionally exhausted, arising just from fear. It is an amazing thing, really, that Barton's trevail lasted exactly sixty days, from 17th November to 17th January. I do not want to take up too much time on the point, although it is a simple thing that according to this it is exactly sixty days, and according to the book the average soldier reaches sixty days. What a remarkable coincidence it is. I do not want to put it any higher than that - 60 days from 17th November Barton finally signed this contract. 30 40 50

They point out that the loss of memory is one of the indicia of this type of mental exhaustion. Again I can point, as I said, to the fact 60

that here is Barton - a man who was proud of his memory and said he was famous for it - completely forgetting these interviews between 14th December onwards with Smith and positively denying that they took place. You can search the evidence uphill and down dale and there is no reason why he should do it. He made the same mistake in affidavits sworn in March and April, and they are in evidence, and that factor had nothing to do with anything. Here is a complete gap in his memory over this period - as his Honour found - where he was in a state of terror. One finds it is not unusual for loss of memory to occur in men subjected to terror. Indeed, put the other way, what we put to your Honours is the fact that a man like Barton suffered that clear loss of memory --- 10

TAYLOR, A-J.A.: He did not suffer loss of memory, he remembered in detail what happened. He had an unfortunate loss of memory about the date it happened, he knew he talked to Smith. 20

MR. GRUZMAN: No. He remembered exactly from 4th January onwards. I don't think on the evidence, if I may say so, he remembered fairly accurately the conversations of the 4th January. He was not mistaken about the conversations but he did not say it occurred on the 14th December instead of the 4th January or anything like that, he knew the conversations perfectly well but because of the complete gap in his memory he was not sure of their dates and that is the evidence which suggests that he was under emotional tension. We submit that as a positive indication that if a man of his memory - of which he was in this case quite proud - could have that gap in his memory it points to something which emotionally he was trying to put out of his mind. I don't want to emphasise it, there is no need to. What a shock a man would get if he was spoken to by Armstrong on the 14th and told "you do this, that and that or you will get killed"! It would be a sort of thing a person would want to forget and believe never happened. 30 40

They speak here also of the ups and downs of behaviour. The extremes of aggressive behaviour, alternating the unpredictable with abject submissions. He says on page 47 that a lot of people suffer from a temporary loss of memory, a simple inhibitory response of the brain to overwhelming stress and points out that in peace time psychiatrists rarely meet one or two of this type of complaint in the course of a year. He points out greatly increased suggestibility in human beings in that study and also the opposite (page 49), the normal states in which the patient is deaf to all suggestions, however sensible. In other words, under the influence of fear a person's behaviour is irrational and unpredictable. On the one hand he may agree with anything you say to him and on the other hand it may be impossible to convince him of anything, however rational. One of the matters that some of your Honours might recognise as being right is this suggestion that what happened in England during the Blitz ... 50 60

JACOBS, J.A.: Would you say that Mr. Barton was a strong, excitatory type or a weak inhibitory type?

MR. GRUZMAN: A strong type.

TAYLOR, A-J.A.: How do we know that? We have not seen him, but the judge did.

MR. GRUZMAN: Your Honour referred to the fact that he took on Armstrong and he was doing something which you would think of a strong man, but when you look at this book it is the strong people who succumb most. It is the strong people who need five to eight times the dose of the weak, and the strong who succumb most of all. To those of us who have never considered this before, specially myself, it is rather interesting.

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JACOBS, J.A.: Was there any evidence of his loss of weight up to 30 lb?

MR. GRUZMAN: There is evidence that his hair - this was another matter that was dealt with on the evidence, and it just happened to come out. At the time he signed the agreements (this is Mr. Bovill's evidence, which is uncontradicted, page 438) his Honour said "try and keep it entirely in terms of objective observation ... since resumed its normal colour".

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JACOBS, J.A.: Was he taking drugs at the time?

MR. GRUZMAN: No, no evidence of that.

JACOBS, J.A.: That would be important to know.

MR. GRUZMAN: Yes, your Honour, but there is no suggestion made by anyone that he was taking drugs. On the other hand Mr. Staff cross-examined on this sort of thing I put to your Honours this morning about fatigue, because he thought it supported him. At page 518: "The control and the administration of the company throughout this period was in Mr. Barton's hands as managing director? A. Such control as there was ... you could not get him into any money discussion which would provide a solution, his mind seemed to be on other things". So here is his description, by his co-director at that time, that he was grey in the face, his hair suddenly turned grey. There is an explanation for that which I will offer in a moment, He was not with it, unable to concentrate, in all the description was of a very distraught person. Mr. Staff cross-examined at some length about the grey hair and elucidated the fact that Mr. Barton had been in the habit of having his hair dyed and apparently over this period did not do so. This is again an illustration of the fact that the fear in which he was placed was affecting everything about him, even his care for his own appearance.

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So we are suggesting in putting this that we are justified in submitting that this state of fear in which he was, was in fact affecting him

very much and, as I have said, one cannot find greatly increased suggestibility - on the other hand, deaf to all suggestions. I mentioned about the Blitz and the brain exhaustion of ordinary people in London led them to believe the stories of Lord Haw Haw, broadcast from Germany, which they would have at once rejected as untrue when in a more relaxed state. But we all know this sort of thing happens when people are frightened, they believe rumours and stories which normally they would not believe, or they attach more credence or allow them to have more effect on them than when they are in their normal state.

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One of the indicia is this increasing state of suggestibility. They point out also that in peace time there is an opportunity for escape generally given to those who find themselves in situations that make great demands on their nervous systems. This might be one of the matters that your Honours would take into account: I submit one should assume that this reign of terror was having an effect on Barton's nerves or nervous system (call it what you will) and then he would tend to choose a way of escape - which was the agreement. Indeed, as we will show your Honours, there is need for no more in this case than to accept that proposition.

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Again, this sort of position can tend, they say, to make people think and act in ways different from what they have done before. At page 127 it was pointed out that when one is trying to cause someone to change his views after a certain time all that is to be said - he could content himself with - "you had better hurry folks, or else". Again, I do not want to draw too much of an analogy but is it not amazing that the very conversation which his Honour accepts as having occurred on 12th March is in almost precisely those terms!

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Again, dealing with interrogation under pressure at page 191, the doctor says that the prisoner still relies on his intelligence, his critical powers and his character to guide him and restrict his depositions to harmless statements of fact; but here he is wrong. He does not realise that during the few weeks of questioning his faculties have diminished, his power to reason has become corrupted, he is a completely changed man. That, again, is an indication of the insidious effect of pressure over a period. Probably the worst part of it, if a man does not think is that inside he thinks he is all right or might think that he is all right when the fact is that he is not.

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I think that is all I wish to refer to in that book "Battle for the Mind". It is not proper for me to ask your Honours to make direct analogies but it is appropriate, in our submission, that your Honours should have amongst all the wealth of other matters some knowledge, some experience (albeit second-hand) of what effect fear can have on people under certain circumstances. Indeed, as Sir Samuel

Romley said in Huquenin v. Baseley, (1807) 14 Ves. 273; 33 E.R. at 531-532, "What are all other ... important to the community". So it is proper both on long authority and on a commonsense approach that this Court should look as best it can into Barton's mind and try to ascertain for itself what effect a prolonged period of fear and terror would have had upon him. The evidence of the physical effect on Barton is of quite great significance. We would put it that at that point of time what he had to weigh up was on the one hand the continuation of a state of fear for himself and his family and on the other hand the commercial considerations of his own and of Landmark. So one can well imagine that any man, if he was a man at all, would say "No commercial consideration in the world (whether his own or an accomplice) should be allowed to interfere in any way with considerations for the safety of his family first and for himself second".

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On the evidence here there can be no doubt that such considerations must, on his Honour's findings, have been present to the mind of Mr. Barton.

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The other way of looking at it is this: as his Honour says, in this very real mental torment can one really imagine that Mr. Barton was in a mental condition to nicely weigh up all the pros and cons of a commercial situation? It is impossible to imagine that he could do so. And when one is faced with - I won't say exactly panic, but a sort of fear, the alteration which it makes in one's thinking processes - where one finds one's self acting perhaps as one thinks logically when in fact one is being quite illogical. One, for example, calls to mind cases of the agony of the moment where because a situation has occurred the actor acts as he thinks is right but which basically turns out to have been wrong.

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Some of the things that his Honour held, as it were, against Mr. Barton on his state of mind - for example, "It is a miracle. Now we have got rid of Armstrong nothing will stop us" - are matters which can be perfectly explicable where you imagine, as it were, Barton was whistling in the dark, seeking to uphold the credit of a company. After all he did have a mandate from the general meeting only a few weeks before and it was his job to manage the affairs as best he could. If he went around saying that the company has been robbed, first of all his co-directors would not have accepted the position. They would have done something about it and there would not have been the slightest prospect of even an orderly realisation of the company's affairs.

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So on Barton's then state of mind it is difficult to avoid the position that what he said and what he did at the time must have been brought on, in part at least, by the fear under which he was labouring.

These sorts of situations, with expressions

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of this kind, are not uncommon. Indeed, as I indicated when I first invited your Honours' attention to some aspects of the law, most cases of this kind involve the proposition that either outwardly or inwardly as the case may be the person who has been impelled to do something may either say or think that it has been a good thing. That is the effect of the inference. One case I might refer to is Skinner Company v. Irish Society, 49 E.R. 1196. I won't bother your Honours with the details of it. 10
After some negotiations an agreement was entered into between King James I - (reads headnote) just before the revolution they were haled into the Court of Star Chamber and certain affairs took place there and eventually they were fined £70,000 and it says at page 633: "The City endeavoured to obtain relief from the oppression and to make available before the House of Commons ... former footing". However, civil war then supervened. 20
"But I am of opinion that the allegations and admissions used ... to any degree in his judgment". In other words, one cannot use against Barton expressions attributed to him at a time when he was under the influence which his Honour Mr. Justice Street found.

Now, your Honours having heard so much of the facts as is necessary in our view, we come to look at the principles of law. I have already referred your Honours to certain basic principles and I now refer to another set of cases which we will be establishing establish the principles applicable. 30

TAYLOR, A-J.A.: The principles to be applied in what? Determining whether or not he was induced by these events to enter into this agreement?

MR. GRUZMAN: No, the principle which the Court in Equity applies to facts such as these.

TAYLOR, A-J.A.: Before Mr. Justice Street you only made one case about duress and physical threats. If you come here to make a case of special relationships, you would have no findings from the trial Judge that the case was ever put to him. You have told us time and time again that the only case that was put before the Court was whether Armstrong threatened to kill Barton but in fact I understood you to say at some stage you barely condescended to discuss other matters you now put. 40

MR. GRUZMAN: I have said, and I say it again if necessary, that the case made before his Honour is a different case to the one made here. There is nothing unusual in that. What I intend to do is to invite your Honours to the principles of law and then subsequently to the question of amendment. There is nothing unusual in a change in the way in which a case is presented right, indeed, for the first time up to the House of Lords. 50

TAYLOR, A-J.A.: You have got findings from the Judge on witnesses. If you present another case it may be that those findings on credibility are immaterial.

MR. GRUZMAN: No, your Honour, because one of the principles upon which the Court will act in deciding an amendment as well as the facts have been gone into to the extent that it is not unnecessary. I do not want to argue the question of amendment now for the simple reason that one of the principles upon which the Court acts in deciding whether it should grant amendment is to decide firstly whether an amendment is likely to be decisive or of importance in the decision to the case. So therefore one has to put to the Court matters in such a way that the cart is before the horse. That is why I ask your Honours for the moment to, as it were, preserve an open mind on what the ultimate issues will be. You have already seen the statement of claim and there is an amended notice of appeal as to which no application has yet been made but after I have put the principles of law then I propose to submit that according to those principles of law and according to those facts which you can find on the evidence, the appellant should succeed. 10 20

TAYLOR, A-J.A.: On what issues?

MR. GRUZMAN: On the issues in the amended statement of claim.

TAYLOR, A-J.A.: Never heard or argued before the trial Judge?

MR. GRUZMAN: That is right.

TAYLOR, A-J.A.: And upon which we have no evidence to help us?

MR. GRUZMAN: If your Honour, Mr. Justice Taylor, came to the conclusion that on the application for amendment any of the findings on credibility by the trial Judge were irrelevant - it may only be irrelevant if your Honours came to the conclusion that there has been a full and proper consideration by the trial Judge, and upon those findings - or the findings made by him - or upon the evidence, you can consider the propositions put forward upon the amendment and on that basis you allow the amendment. But we have not come to that yet, not until your Honours have first of all heard the principles of law and then decided whether on those principles and on the facts you could, or might reasonably make, a decision in favour of the appellant. 30 40

His Honour, Mr. Justice Street, only refers to one little bit of law in the whole of his Honour's judgment. I think I have made it clear, if I have not I say it again, the fact that his Honour does not refer to cases is a reflection of the fact that the cases were not cited to him and that is a reflection for my part, on the way I presented the case to his Honour. But I am not dealing with that aspect of it but the facts as they emerge from the judgment. The only question of law or citation of law in his Honour's judgment is the one extracted by his Honour at page 301: "The principles of law on which Mr. Barton relied ... may be recovered". 50

I now hand to your Honours three volumes entitled "Law II". These are the cases to which I now wish to refer.

Your Honour, Mr. Justice Mason, at an earlier stage of the proceedings asked me what distinction I drew between the duress on the one hand and undue influence on the other. We have extracted, as the first matter appearing in these principles of Law, Salmond & Williams on Contracts, which sets out, I think, an interesting discussion on this point. "The term undue influence has its historical source in ... duress". It contains matters with which your Honours are familiar; physical restriction and so on. "Undue influence as understood in Courts of Equity included ... undue influence".

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At page 287, "Equitable relief against fraud, it reads:

"In one instance where there is some inequity ... life of their father."

In the next paragraph it states: "It is always thought presumed or inferred from the circumstances or conditions of the parties ... fair, just and reasonable".

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The other matters referred to are cases to which we will take your Honours directly. There is no need to refer to them here.

The first case that illustrates the principles is Norton v. Relly. That is a case concerning a preacher. This case was not referred to in Huguenin v. Baseley. It comes to much the same conclusions for much the same reasons. At page 909 the Lord Chancellor said, remembering this goes back to 1764:

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"This Court is the guardian and the protector of the weak and helpless of every denomination ... if it did not."

Halfway down the page he says:

"The very material and most essential point in law, the consideration of the deed, say the defendant's counsel ... appears in the cause."

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I only mention that case because in all of these cases you are going to find a certain condition, that the Court is always looking to see is it a real consideration, is it an adequate consideration, and as we will show your Honours later in a fairly recent case in the High Court where there was only a 20 per cent. difference between market value and what was paid, the High Court in 1956 regarded that as a sufficient imposition. At page 910 it says:

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"I would consider this cause not merely as a private matter but a public concern and utility".

Right from the beginning, in 1760, the principle is laid down. It is a matter of public concern. You will punish fraud and imposition. "Fraud" is used in a wide term; it does not mean fraud in the sense of misrepresentation or anything like that. Right from the beginning three points arise. The Equity Court will punish fraud; secondly there may be a consideration which may have appeared very good to the person who contracted, and the third thing, it is a matter of public policy.

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JACOBS, J.A.: When the Lord Chancellor describes this as the first case, he means the first case that involved religion?

MR. GRUZMAN: Yes, "the first of the kind that ever came before this Court".

JACOBS, J.A.: Who was the Lord Chancellor in that case?

MR. GRUZMAN: I cannot assist your Honour. The real point we find is how amazing it is the whole variety of principles do not seem to have changed; fraud or imposition, punishment, public policy. These are the overriding principles and whilst one will not discern each of the principles in each of the cases, nevertheless one discerns at this early stage in the development of equity the three principles I have mentioned. They enunciate and apply the basic principles.

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The next case is The Earl of Aylesford v. Morris. This case was in 1870. This concerns a money lender/expected heir case and at page 489 Lord Selborne said:

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"There is hardly any older head of equity than that described by Lord Hardwick ... is equally unable to judge for himself in one as the other."

What they say there is that the Court will prevent the taking of a surreptitious advantage of one person or another.

Here Armstrong certainly knew of a pressure that he was applying to Barton. At page 490 it states:

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"In the earlier case it was held to show that undue advantage was taken of such persons ... property purchased."

At the bottom of the page the last sentence is: "These changes in the law have ... at the expense of the person subject to it".

I want to ask your Honours to consider whether it says "Where influence however required" that in a case where one man is asserting to kill him is an a fortiori case compared with the sort of influences which are spoken of here, which are mild and milky by comparison.

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TAYLOR, A-J.A.: Why does a threat to kill a person give you any influence over him?

MR. GRUZMAN: If I may answer your Honour with a question? Why have the courts held, for example, if a person is kind to someone else it creates an influence?

TAYLOR, A-J.A.: You do not answer one question with another. The fact one person threatens to kill another would not, in my opinion, give them any influence over them at all. It would provoke a desire to hit back, and a desire to have him removed from society, but how would it give them influence? 10

MR. GRUZMAN: It depends on the circumstances. If the threats are being made ---

TAYLOR, A-J.A.: If you are going to say if you have a frightened individual you can subject, over a long period of time, to pressure then it may be. That is not what you said. I was only taking exception to your general statement that a threat to kill gives a person influence over another. 20

MR. GRUZMAN: I was referring to the facts of this case. I mean where there is a series of threats to kill over a period of six to eight weeks, where there is a relationship where one man owes his life to the goodwill of the other and particularly where you know in your mind that what he is after is a commercial advantage and the situation you are dealing with is one that will give him a commercial advantage; that is the sort of thing I am referring to. 30

May I invite your Honours' attention to the same page, a little over halfway down where what is said is this:

"But it is sufficient for the application of the principle if the parties meet under such circumstances as in the particular transaction to give the stronger party domination over the weaker."

That is all you need; you need no more. If the parties, when they come together in a particular transaction, the circumstances are such that the stronger party has domination over the weaker; that is all you need, and this is an unbroken principle to the present day. There is nothing more required in law. I will read the whole passage: 40

"But it is sufficient for the application of the principle if the parties meet under such circumstances ... moral imbecility."

The second part is only an illustration of the principle. Because it is so important I will read it: 50

"It is sufficient if the parties meet under such circumstances ... to give the stronger party domination over the weaker."

Over the page is another very important principle. The second full sentence: "Great Judges have said that there is a principle of public policy ... fulfilling the moral obligation of providing for their own descendants".

I would ask your Honours to note two points in that passage: one that it is a matter of public policy and the second matter is that it is the concept of sort of indirect fraud on the heads of families. It is in the same way, we submit, the contract in this case has an effect on Landmark. It does not matter as between Barton and Armstrong; they were prepared to agree on it if that were the fact but because you were taking the substance out of Landmark and giving Armstrong \$100,000 for shares in Paradise Waters out of funds of Landmark, therefore, the contract is vitiated. Here it says in an even far more indirect case the head of the family is defrauded because the son sells his expectancy.

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On that same page his Lordship also points to the reason why you get this turning around of the onus. He said, "The real effect of ... upon the party who claims the benefit of it". I mention that at page 496 this appears, that they say it was fair and reasonable and it says:

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"The difficulty of such an attempt in face of the admitted facts that there was no real bargaining at all and no inquiry was made into the exact nature ..."

In other words, as in this case there was no real bargaining at all, nor was any inquiry made into the exact prospects of this company's success.

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Mr. Smith refrained from communicating with U.D.C. to see whether finance could be obtained.

TAYLOR, A-J.A.: You are not suggesting Barton was not in a position to know better than anyone what the prospects of this company were or what were the values of its assets?

MR. GRUZMAN: He knew, but the question is when the Court is considering whether this was a righteous contract the Court will say to itself, "Barton says he had no hope of getting the money". You might say to yourself, "Did Armstrong go and make some inquiry; did Armstrong satisfy himself as to the contract because there was a reasonable chance of getting the money; did his financial advisor, Mr. Smith, satisfy himself there was no chance of getting the money, or on the contrary, Mr. Smith, after such inquiries as he saw fit to make, would not even accept the chairmanship.

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Looking at it from Armstrong's point of view one should say was Armstrong seeking to get something unconscientiously and it is to that we submit there is no denial. There are two points, and I will show your Honour the authority for it later; but if the contract is obtained unconscientiously

it does not matter whether it was a good or bad contract, and that is the opinion of Mr. Justice Fullagar in the High Court, but secondly, there is another principle that certainly if the contract was obtained unconscientiously and there is any element at all of under value then there is no doubt about the matter, but as far as Mr. Justice Fullagar is concerned if the contract was obtained unconscientiously that is an end to it; the contract should be set aside. I will come to that later.

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The next case I refer to is Hatch v. Hatch. I have referred to it before in another context. This was the case where the brother induced this lady to make a contract and his brother was the attorney for the lady and subsequently married her dad he had to be joined for conformity in the action to set aside the deed, so you had the attorney who had been party to misleading the lady as one of the plaintiffs, in the shape of her husband, to set aside the deed. It is a very strong case and as Mr. Mansfield said:

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"The bill was filed 20 years after the transaction after the death of the party who obtained the deed ... by will."

That is a terribly strong case applying this principle. Giles Hatch had been the girl's guardian and after she obtained her majority this contract was made. At page 616, I would like to mention this, which again your Honour will find as a principle going through the cases, "The principle protection of the ward from the undue influences of the guardian ... during minority". In other words when one is engaged about a business where it is really not possible to say about the circumstances or a course of conduct, equity presumes it and they presume it because you simply cannot tell what effect it may have had. That appears to be a general principle through the cases. Over the page it reads:

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"This case proves the wisdom of the Court in saying it is almost impossible ... to give him the world."

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We are concerned with the reasons. They say the reason is because that inquiry is so easily baffled in a court of justice. That is the principle; it is not the fact.

TAYLOR, A-J.A.: The inquiry into the mind?

MR. GRUZMAN: Yes. It is not the fact the probabilities are so and so, it is the difficulty of finding out what actually happened in the mind, as to whether it was a spontaneous act or as a result of influence. The principle is if there is this relationship then because you cannot tell whether to raise it from the relationship or not, and for that reason only you set it aside unless there is positive proof from the other side, which it may be very difficult to provide.

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In the Judgment in Hatch v. Hatch it is also said:

"It may be a mind misled by undue kindness or force by oppression ... to fraud."

The Court is to watch these transactions with a jealousy almost invincible; and that is why even though it was the woman's husband who secured the deed, and he was ordered to pay costs, nevertheless the principle had to be maintained.

In the case I have cited there has not been one which, if I may use the expression, holds a candle to this one because they have been legal influences, influences which have come about in the course of proper transactions; no illegality involved. The same applies to the next case, Billage v. Southee. That is a documentation case. The patient had a change in his circumstances. In other words, he came into some money and in that case the doctor got a note for £325 and absolutely could not justify it as to services.

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The case started off as an allegation of positive fraud. The real allegation was that the man did not know what he was signing. That was completely disproved and it was put the plaintiff must have known the statements of his bill to be untrue and in such a case he would not be allowed to fall back upon the secondary ground of relief wholly independent of the fraud. That argument got nowhere. Although he started with an allegation of fraud and it was found to be untrue, on the whole of the matter nevertheless he succeeded because of the equitable principle. At page 540 it reads:

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"The case in this respect is ... instances of the application of the principle."

That is a case illustrating fairly clearly this principle in a hard case where there had been an allegation of fraud completely disproved, and the plaintiff could hardly be said to have come with clean hands, but the principle of the law had to be vindicated.

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We now come to page 34, Mutual Finance v. John Wetton. Whilst referring to this case your Honours might have in mind the facts of the case before you which are that Armstrong was threatening Barton, of which Barton was aware. It was also obvious to both parties if they came to a commercial deal that the threats would come to an end. That would be the natural expectation of both parties. Not a word was said about it; no suggestion of that but if, as your Honour found, Armstrong was threatening Barton, then it is perfectly obvious, as a matter of commonsense, each would have expected, if they sat down and did a particular deal together, particularly if it advantaged Armstrong that would have been the end of the trouble. I am putting this on the interpretation of his Honour's finding.

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TAYLOR, A-J.A.: You have to say in this submission that the inference is the threats materially brought about the signing of the document. You say if you get the threats and the relationship you do not have to do any more than that.

MR. GRUZMAN: This is on a different point. The reason for his Honour's finding was, on the case before me, Barton's will was overcome, his Honour did not find that.

TAYLOR, A-J.A.: He found it was not so far as signing this deed was concerned. 10

MR. GRUZMAN: Yes. May one forget what his Honour found for the moment, because that was directed to a particular issue. We can be criticised for not putting the right issues to his Honour but in the end that will not determine the case. What will determine it is the issues your Honours think are the proper issues to be litigated and the views of your Honours on those issues.

TAYLOR, A-J.A.: That is why I arranged it. I do not see how this case could apply if you accept his Honour's finding. 20

MR. GRUZMAN: I accept that. That is why I interrupt myself to say before your Honours what is put is this: Armstrong threatens Barton, Barton is aware that he is being threatened by Armstrong; each party would have thought if they entered into a commercial deal together that that would be the end of the threats. That is a matter of common-sense. Indeed, it is a finding we ask your Honours to make. 30

TAYLOR, A-J.A.: I do not know what you mean by a commercial dealing, do you think they would have realised that one or other would have to go?

MR. GRUZMAN: No. Say at the afternoon of 17th January before the document was finally signed; imagine speaking to each of them. Armstrong would say, "If I get all my money and all I want I won't be interested in you any more, I won't be threatening you any more, there is nothing to threaten you", and Barton, on the other hand, would say, "Of course, if I give him what he wants he won't threaten me". Of course, whatever it was between them the submission is your Honours will find implicit in the arrangement was the tacit understanding that if this contract was signed that would be the end of the threats. 40

With that in mind I would ask your Honours to look at Mutual Finance v. John Wetton. The head-note reads: "... entitled to repudiate that". 50

This son had left the company some time before and set up in business selling motor trucks and in order to get the finance company to finance the sale of a motor truck he forged the company's signature to it. As it appears at page 392 in the judgment this was said:

"No definite threat in terms was used ... arranged."

This was not a case of their will being completely overcome because they were going to guarantee the new purchaser but they were not prepared to unless the new purchaser entered into a contract which he could properly perform. It was by no means a complete subjection. At page 393 it says: "Between January 16th ... in favour of Gregory and the defendants as his guarantors".

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Mr. Justice Porter, as he then was, at page 394 said:

"The plaintiffs are entitled to recover ... or by undue influence."

Your Honour Mr. Justice Mason rather illustrates these terms. It reads:

"If there was any duress ... evolved in the Chancery Courts under the name of undue influence."

JACOBS, J.A.: They needed to say that in that case; we do not. Ours is a case of duress.

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MR. GRUZMAN: No.

JACOBS, J.A.: So often the courts have been faced with the problem that it is outside the common law and therefore they have to have recourse to the equitable area of undue influence, which is so much wider.

MR. GRUZMAN: The trouble, following from his Honour's judgment, is that his Honour was not satisfied that threat was directed, on the one hand, or understood by the other party to be directed to this particular contract and on that basis his Honour found against the plaintiff.

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JACOBS, J.A.: I know one of your answers to it, but the wider equitable principle, unless you go to the further one of the relationship of influences, does not help you. That undue influence is only going to help you if you can establish a right to rely upon the existence of a relationship of influence. If you cannot we have not got to worry about undue influence because this, whatever it was, if anything, was a case of duress.

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MR. GRUZMAN: We submit it is not quite as simple.

JACOBS, J.A.: Where am I wrong?

MR. GRUZMAN: We would submit your Honour is wrong in two bases. First of all, we say the contract having been obtained when a situation of pressure between the parties existed, that for that reason and that reason alone it would be set aside.

JACOBS, J.A.: That would be the same at common law as at Equity?

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MR. GRUZMAN: No. For the moment one concedes the common law principle is that it had to be directed to that contract. That is the first basis. There are other similar bases. In other words, equity looks to public policy.

JACOBS, J.A.: You say there is a principle of equity which says that where a situation exists irrespective of a relationship of influence where there was an attempt to influence, equity will interfere?

MR. GRUZMAN: I do not know whether I submitted it quite that way. 10

MASON, J.A.: You put it this way: the overriding equitable principle is if you can establish a situation of disadvantage prior to entering into the contract and an unconscientious use of that position by the contracting party who receives a benefit, then the equitable principle applies? Do you put it that way as a general principle that takes up all these illustrations to which you refer in respect of heirs, undue influence; all can be put in this general principle? 20

MR. GRUZMAN: Yes; that is what the High Court says.

TAYLOR, A-J.A.: I have been looking at these cases on the obligation as to whether there is a rehearing. It seems to me they say I have an obligation to retry or make up my own mind as to what the facts are or what the facts were, on the material before me. Then if there are any questions of credibility I may not set aside the trial Judge's judgment, findings of fact, unless I am satisfied that he is clearly wrong. As I understand the argument you are now putting we do not have to be troubled about whether the Judge was right or wrong because he never addressed his mind to this situation, and yet on a rehearing we are going to pay no regard whatsoever to his judgment, on this matter. 30

MR. GRUZMAN: The basic principle is that one pays respect to the judgment of the court below.

TAYLOR, A-J.A.: He never had a chance to make a finding on this issue; he never had a chance. 40

MR. GRUZMAN: That is true.

TAYLOR, A-J.A.: You said in your opening with some confidence that it was for this court to try the issues and come to its own conclusions and give whatever relief it thought proper and you would have to require some amendments to the statement of claim before you could make that and you have said here from time to time the issue you fought before his Honour was the common law issue of duress. 50

MR. GRUZMAN: It was the equity court. It was pressure.

TAYLOR, A-J.A.: You were seeking equitable relief

to set it aside. We do not come to any different conclusion than his Honour came to on this equitable doctrine; he never came to a conclusion. It was never debated before him. If you can do that what happens in the Court of first instance for 58 days does not matter? I have always thought the court was a place for the parties to raise their issues and have them adjudicated upon.

MR. GRUZMAN: I will refer your Honours to the authority. I think the best one is Nocton v. Ashburton, (1914) A.C. This is a case where a solicitor was charged with fraud and he defended it successfully. It then went to the Court of Appeal and subsequently to the House of Lords. In the Court of Appeal the Court said: "Yes, it is a case of fraud". 10

JACOBS, J.A.: You mean deceit? Common law fraud?

MR. GRUZMAN: Yes. What he had said all along was, "Whether or not it is negligence it certainly was not fraud" and the Court of first instance said it was fraud and the Court of Appeal said it was fraud. When it got before the House of Lords the plaintiff then changed his ground completely. 20

TAYLOR, A-J.A.: Why did he have to?

MR. GRUZMAN: Because the Court had accused him of fraud and they then maintained it was negligence, and for the first time in the House of Lords they were permitted to argue it as a matter of negligence and he was found guilty of negligence.

JACOBS, J.A.: It was not negligence. It was a form of equitable fraud. 30

MR. GRUZMAN: No. Indeed, if I may read this passage from 1914 appeal cases:

"In this case the statement of claim alleged fraud ... on the same lines."

We are seeking a general amendment and when one looks at the authorities the principle is these cases are not decided by the mistakes of counsel.

TAYLOR, A-J.A.: Not after a 58 day trial; if the plaintiff does not put a proper case he is stuck with it. If that were not so the case would not end. You could have other counsel coming in and saying, "We want to make another case". 40

MR. GRUZMAN: Supposing your Honour said, "We will not allow that amendment" that would mean that issue has never been tried.

TAYLOR, A-J.A.: Whose fault would that be?

MR. GRUZMAN: We would then have to go back before the Judge and start the whole new case for another 58 days, on the same evidence, both sides, just to argue different questions. We submit that is not 50

in the interests of the administration of justice and that is why it is that the authorities say in a case like this these amendments should be allowed. There are a number of authorities on it. We are prepared to argue it.

The case of Nocton v. Ashburton where the whole case went to two courts and was only one of fraud, and then before the House of Lords for the first time negligence was alleged and found to be proved on the evidence which had been adduced. I suggest that is an example of the extent to which the courts will go.

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(Further hearing adjourned to 10.15 a.m.
Tuesday, 9th March, 1971.)

IN THE SUPREME COURT)

OF NEW SOUTH WALES)

COURT OF APPEAL)

Term No. 22 of 1969

CORAM: JACOBS, J.A.
MASON, J.A.
TAYLOR, A-J.A.

BARTON v. ARMSTRONG & ORS.

THIRTEENTH DAY: TUESDAY, 9TH MARCH, 1971.

MR. GRUZMAN: Just shortly prior to the adjournment I had gone to the case of Mutual Finance Limited v. John Wetton & Sons Limited (1937) 2 K.B. 389. That appears at page 34, Law II. I had asked your Honours to have in mind that at the time of the execution of the agreement in question it was fairly obvious that each party would have thought to themselves "This will be the end of the trouble, this will be the end of the threats. Armstrong has no further need for threats and Barton knows that". So each party, without saying it, regarded the agreement as bringing the threats to an end and, although it did happen, you could not really have expected the threats to be continued after that agreement. 10 20

In those circumstances one looks at Mutual Finance Limited v. John Wetton & Sons Limited, remembering, of course, that the threats were illegal conduct. I had reached the point of referring to page 349 where Porter, J. (as he then was) said, "Prima facie the plaintiffs are entitled to recover ...". Then they refer to Salmond on Contracts. Your Honours are already familiar with that extract. One third of the way down the page they mention "the case already cited ... would be contrary to public policy. The contract may be invalid because it is contrary to public policy (page 395) ... may be held contrary to public policy". 30

Then they go on to say "Duress at common law can only be pleaded where the ... to whom the undertaking was given". So understood, that case is exactly this case. "In such a case ... any prosecution should take place". That is, a term in the contract that there should be no further threats. 40

JACOBS, J.A.: I am concerned more, Mr. Gruzman, with precisely the enunciation of the point you are making. I do not see that these cases which fall short of a relationship of influence ever shift the legal onus. Yesterday afternoon Mr. Justice Mason enunciated, not his own but a summary of what you were putting and you agreed with him; that the overriding equitable principle you put is you can establish a situation of disadvantage prior to entering into a contract and an unconscientious use of that position then the equitable principle applies. 50

MR. GRUZMAN: Yes. I agreed with that and I do agree with that.

JACOBS, J.A.: And, if I may say so, rightly so. The thing is the words "unconscientious use". Do you mean here an unconscientious attempt to use? Because once you say the words "unconscientious use" you are answering the question, anyway, that is the real problem facing you. Because if there is a use with an effect, that is the end of the matter. If there is the use without any effect it is irrelevant unless the principle goes that if you attempt to use a position of advantage unconsciously the transaction cannot stand. If that were the law there would be no cases of undue influence that have to be proved as a matter of fact because undue influence is always a situation where a person is at a disadvantage and another person is making use of that disadvantage. But it is not enough to attempt to make use of it in this particular case, which is equal to a case of undue influence. You must prove it as a fact. I say these things because I am not clear in my mind as to what you are getting at. If you are attempting to prove the duress in the sense of acts without their effect, then this is a case of duress unparalleled, so far as you have mentioned, in the books. It is a theoretical example of duress that has not appeared in the law reports; namely a threat to kill. So you are not troubled with that. What you are troubled with is the effect of that threat. I do not say that your enunciation along the line of this present case carries you over the hurdle and I do not see how there is a general principle of equity which does not take account of the effect of the behaviour. Otherwise, and I repeat myself, there would be no law that requires proof of undue influence in fact where you cannot establish a relationship.

MR. GRUZMAN: Your Honour, I accept the proposition, or the summary of my proposition, from Mr. Justice Mason yesterday because that is in fact our submission. We can put it even higher than that.

MASON, J.A.: Before you attempt to put it, might I indicate to you some difficulties that I see? It does seem to me it is not very helpful to take us to a myriad of cases dealing with different situations containing different expressions of principle and even differing principles. It seems to me that as a preliminary construction of the article we have to know what are the alternative principles for which you contend. One of the difficulties is that as we go through the cases and some question is put to you, you then, as it were, put forward one of the submissions of law - one of the alternative submissions of law - that you seek to make. I think that in advance we ought to know what they all are, so you can address upon them according to your preference and according to a preferred order. In other words, otherwise we are never going to have any order in the presentation of the argument.

But, coming back to the principle which I stated that I thought emerged from your argument

yesterday and with which you agreed and you now state you can even put higher - before you do that have you not got to clarify the principle as it was enunciated yesterday? It seems to me that you have to bear in mind two differing situations. The first is the traditional situation in which there exists an antecedent position of disadvantage to one party, and, secondly, whether the position is disadvantaged is not due to the person who ultimately receives a large benefit because it exists objectively? He then comes along and shows that there is an unconscious use by him of that position. It is the subsequent act on his part which merits the description "unconscientious use".

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Your present case is a case that differs from that because in essence you are seeking to say that the defendant created a position of disadvantage by his own act and it may be that, through that act, that created a position of disadvantage there was at the same time an unconscientious use of it.

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I do not know what you say about that and I would like to know. But I think you ought to bear in mind that in a large number of cases from which this principle is said to emerge you have firstly the antecedent situation of disadvantage and a subsequent unconscious use, but your case seems to be a somewhat different one. I say that really to highlight the difficulty that has been pointed out to you by the learned presiding Judge.

MR. GRUZMAN: We did submit a set of principles and I did say at the time that they were forecast I thought possibly there would be some alteration. We do propose to alter them in another one that is coming up. We did submit, as we would submit what are the basic principles and one was that if B enters into a contract with A, whilst B is under fear of A, whether or not that fear has been induced or known to A ---

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MASON, J.A.: I follow that, but you see the four propositions that you jotted down on a piece of paper are stated in a terminology that is quite different from the discourse in which you are now engaged. You are taking us to the equitable cases, the traditional cases of Equity, and your submission is framed in terms of that language, whereas your four propositions one to four, are framed in quite particular terms which are addressed rather to a situation of fear, with the exception of three and four. No. 4 more approximately approaches the submission that you are currently making.

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MR. GRUZMAN: I might say that there is a fifth.

JACOBS, J.A.: Also in the fourth enunciation I draw attention to the word "by" in the third line - "by unconscientious use", and merely reiterate that you have everything in your favour in the judge's favour except what is explicit in the word "by"; namely, cause and effect.

MR. GRUZMAN: There is a fifth principle which I will state now, or it will be on another piece of paper as a further version of this bit of paper, which is this - (three copies produced to Court). The first four are the same and there is an additional one which sets out the principle, as we understand it, in Bromley v. Ryan.

MASON, J.A.: I understand this, and this answers one of my criticisms which is that your new proposition No. 5 more closely approximates what you were putting yesterday afternoon and have been putting this morning. I did not see that statement of principle in the earlier document you handed up. One assumes from the order in which these propositions are stated that proposition No. 5 is perhaps the least?

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MR. GRUZMAN: I would not ask your Honours to assume that, any more than matters in an Article of Association of a company bear any different weight because of their numerical order.

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JACOBS, J.A.: I know that you will no doubt rely on Bromley v. Ryan. If at an appropriate stage you could reconcile that with the enunciation of principle that undue influence has in some cases to be proved as a fact and its operation has to be proved in respect of the particular transaction ---

MR. GRUZMAN: Yes, your Honour.

In Mr. Bowen's argument the way he approached it was to look at the cases and then to extract what he said were the dominant principles; a situation of power, weaker and stronger and unconscientious use, and the point was taken against him by Mr. MacFarlan (as he then was) that the Judge had never considered or asked himself the question as to whether there had been an unconscientious use. McTiernan, J. said you could see it from the facts, it was obvious. The way his Honour put it was that you could see from the facts here that there had been an unconscientious use of the position. This was simply a case of property, which had a valuation of £33,000 - not that there was a buyer for £33,000 but that had been the man's asking price, £9 an acre. So there was a valuation of £33,000 and a sale for £25,000. McTiernan and Fullagar, J.J., and the trial Judge, Taylor, J., all held that this was still under value and for that reason you could say there was an unconscious use. Fullagar, J., went further and said that you did not, in all cases, have to have an under value. He said it is enough if there is this position of superiority. Anyway, I will come to that case later on.

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TAYLOR, A-J.A.: Is not one of the difficulties in this case that you have against you a specific finding that something else caused you to enter into this contract and while that finding stands it is difficult to say that these cases apply or different principles apply?

MR. GRUZMAN: It depends on what point of view you

look at it from. If you look at Barton's point of view - and do not take me to be positively saying this - it may be used. If you look at it from Armstrong's point of view, that he is engaged in illegal conduct, it is a different matter.

Then one looks at the cases and that is why I have stressed, in referring your Honours to these cases, the element of public interest; that it is against public interest to engage in this sort of activity. You will remember where the trial Judge of the Court said it did not matter about any deficiency in the plaintiff, it is the defendant's conduct we are concerned with. I will read your Honours that extract shortly.

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TAYLOR, A-J.A.: How do you reconcile that with the finding? It does not matter what the defendant did. The plaintiff is saying that he entered into the contract for other reasons and what Armstrong did to get him to enter into the contract was just a waste of time because he was going to do it anyway. Where is there room - because there does not seem to me to be any principle in the case you cited which mentions the situation where some other factor brought it about.

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MR. GRUZMAN: I think in Bromley's Case it is not said that he signed this contract because he was under an influence.

TAYLOR, A-J.A.: But there was no other reason for him doing it.

MR. GRUZMAN: No, he just wanted to sell it. Kitto, J., dissented in a powerful dissent to which I will refer your Honours. His Honour analyses the evidence over, I think, twenty-eight pages of C.L.R. in fine detail and comes to the considered conclusion that there is nothing in it. The man had been trying to sell for twelve months. He had stated his asking price to be £9 an acre and his Honour considered the evidence in detail and said it had nothing to do with this condition.

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Putting it in another way, on the case as found by the majority of the High Court, how could the man ever sell? He had a solicitor acting for him, the deal took place in the solicitor's office and he wanted to sell and the price was £25,000, and the valuation was £33,000. The interest rate was 1% down.

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TAYLOR, A-J.A.: He was fortified by Taylor, J., concerning the situation of disadvantage in which this man was being a contributing factor in selling at that price?

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MR. GRUZMAN: His Honour found he was in this situation and then they looked at the sale price and said that from the fact of the sale price you will deduce that there was an unconscientious use of the circumstances.

TAYLOR, A-J.A.: Because of the fact that he was in

this state of disadvantage it would be a reason for him selling at that price?

MR. GRUZMAN: That is the way the judgment goes.

TAYLOR, A-J.A.: Supposing you had a specific finding by the trial Judge that he was going to sell at that price for other reasons?

MR. GRUZMAN: Kitto, J., so finds - admittedly in a dissenting judgment - but obviously the facts admitted of that, as Kitto, J., found.

I understand what your Honours have put to me and may I come to that case in its turn? I would like, if I may, first of all to finish this case of Mutual Finance v. John Wetton, which is a very commonsense approach. It represents a simple solution to the whole case and a commonsense solution. 10

I would just take your Honours to the concept again. Just imagine that Armstrong, we know, has been threatening Barton. Barton, we know, has been under threats from Armstrong. Could anyone really doubt that that when you finally got these two men (not that this happened precisely) to sit down at the one table and to sign a contract settling their differences - signing a commercial agreement together - would not each one have said: Armstrong on his part, "No point in threatening the fellow again"; Barton on his part, "Well, that is the end of the threats". Is not that a commonsense and the practical truth - so regarded - of what is a solution? 20

MASON, J.A.: So long as the plaintiff abides by the agreement. 30

MR. GRUZMAN: Yes, that may be, but we are here dealing with motivation. We are dealing with the suggested motivation or tacit understanding. There does not have to be any more. I am not suggesting that this was a contractual term or an implied warranty or anything of that kind, although it may be. But if one of us were standing in the room, knowing all the facts - Armstrong threatened Barton and Barton is frightened of Armstrong - and we sit down and sign a commercial agreement dealing with their differences, would not any one of us have said, "That is that. That is the end of the terror and threats between them"? It is proved, if one wants practical proof, by the fact that next day Barton regards it as over and leaves the hotel and moves back to his home. There is cogent proof, if one needs it, that so far as Barton was concerned he regarded the signing of the agreement as the ending of the reign of terror. There it is. 40

TAYLOR, A-J.A.: You do not mean even if he signed it for other reasons? 50

MR. GRUZMAN: Whatever the reason.

TAYLOR, A-J.A.: That does not make sense. If a man does a thing because of reasons A, B, C and D,

you are now saying he must be taken to knowing of situation E?

MR. GRUZMAN: I understand exactly, if I may say so, what your Honour Mr. Justice Taylor is putting and I appreciate the force of what your Honour says but I am not arguing the case at the moment on his Honour, Mr. Justice Street's findings.

TAYLOR, A-J.A.: So long as I understand that.

MR. GRUZMAN: I have not looked at it for the moment. Your Honours will remember the preface to his Honour's judgment is that the onus is fairly and squarely on the plaintiff and he says, "I am going to show next in my judgment ... not because I am making positive findings but because he has got the onus and he has got to prove and unless he satisfies me, he loses that point". His Honour makes that abundantly clear. Before your Honours we do not accept that onus. So that on many of these matters the matter is at large. It is in that way that I invite your Honours - and this aspect of it is at large - to say to yourselves, "If Barton sits down, we know that the terror existed, you cannot say it was not influencing his mind at that time because, indeed, his Honour found it was. Is it not logical and normal commonsense to imagine that he would have thought to himself, "When I sign this agreement the terror will end'?"

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JACOBS, J.A.: That does not change the onus. All you are saying in that statement is that the trial Judge was in error in his conclusion that these threats had no effect on the mind of the plaintiff in relation to the making of the agreement. What you are saying is that it is ordinary commonsense that tells you they did. But that does not change the onus. It might change the evidentiary onus but it does not change the legal onus.

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MR. GRUZMAN: I appreciate that. But one of our submissions will be that having established the threats, the onus proving that the threats had no effect on the agreement passed to the defendant. But that is a different matter.

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JACOBS, J.A.: You cannot support it by appeal to the commonsense conclusion to be drawn from the particular cases.

MR. GRUZMAN: There is this difference: what his Honour was directing his mind to was whether the plaintiff had proved that his mind was overcome by the duress. That is the point and the only point, the one and only point (so far as is relevant to this discussion) which his Honour found the plaintiff had not proved. It still leaves open even on his Honour's finding the question whether the threats may have had some effect at the time of the contract - but not to overcome his mind. What I am putting to your Honours is that while we are asking your Honours to change the finding we submit that we can put it consistently with the finding. That is to

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say, even if he had a mind unaffected by threats, and in the sense that he made a positive decision on a commercial basis to make this agreement because his Honour says not that there was a sole but possibly a slight reason. That is on his Honour's finding.

So our submission is that it is consistent with his Honour's finding to say that he would have had in mind "and then, of course, this silly man will stop threatening my life".

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JACOBS, J.A.: But you have changed to a different point, have you not; with great respect? We are quite aware that at a suitable point you are going to argue that matter, but is it not a different point?

MR. GRUZMAN: No, this is the point which I am seeking to make on the basis of Mutual Finance v. John Wetton, which I am seeking to argue now. This is the very point.

JACOBS, J.A.: I thought you were on onus at one moment, and I may have misunderstood you, and then you changed to the elements of causation that were necessary and referred us to some passages yesterday and said you were coming back, and no doubt you will, to the fraud case, to show that it was quite a wrong inquiry to look at the dominating influence and you are going to say they apply to duress. That has little to do with onus.

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MR. GRUZMAN: I was not arguing onus. Yesterday afternoon I started to read to your Honours the case of Mutual Finance v. John Wetton, the point of which, we submit, that if there is some implied understanding with some matter which is contrary to public policy that will cease or be done as a result of the agreement, even though it is entirely unspoken, the contract will not be enforced in equity. That is the point on Mutual Finance v. John Wetton. As Porter, J., said, "As both parties knew the guarantee would never have been signed but for the fear of prosecution of Joseph if the defendants ... was to his knowledge influenced".

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What his Honour said was, "Not only is no direct threat necessary but no promise need to be given to abstain from the prosecution. It is enough if the ... a term in the contract that no prosecution should take place" (page 395). Over the page on page 41 of Law II: "Is the principle wide enough to cover the case where the persons involved are the brother and father of the alleged criminal ... in whose favour the undertaking was given".

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JACOBS, J.A.: So this is a case which says you do not need duress now, but undue influence is sufficient? We have got duress so we do not need to worry about undue influence. But I have said that before.

MR. GRUZMAN: The point of this case is, in our

submission, that this, consistently with his Honour's finding, means the plaintiff should succeed because his Honour does not exclude the possibility that these threats had some effect. He does not exclude it in his judgment.

TAYLOR, A-J.A.: Because he uses the word "possibly". If he had left out "possibly" we would not have had this argument?

MR. GRUZMAN: Not directly on this judgment, that is right.

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MASON, J.A.: You can barely characterise the argument, can you, as saying that the plaintiff was not substantially influenced by these threats? That would not be a fair characterisation.

MR. GRUZMAN: Not on those words. I think those words are not necessary for the judgment. I will put it as simply as this, his Honour says "There may have been some other things operating as well, but the basic reason was commerce. But I do not exclude some other reason". Within that lacuna one can say "Yes, he would have assumed that incidentally the threats would stop and Armstrong would assume incidentally that he would not bother threatening any more". So that all that is necessary for the plaintiff to succeed on this submission is for your Honours to say "Yes, we think that even consistently with the fact that his mind was not overcome by the threats he certainly would have had in his mind an anticipation that the threats would have ceased if he signed the agreement". The word "influence" does not mean necessarily ---

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MASON, J.A.: Why do not you draw our attention to the next line: "Nor do I think it matters"?

MR. GRUZMAN: "Nor do I think it matters that Percy Watton would not have ... that, I think, is enough." Then they go on. One can look at the judgment further: "In all the cases cited ... concerned all parties", and so on. Then they go on, after a consideration of the complications of this transaction, and his Honour says, "In my view, however, what was the ... the guarantee was given". In other words, is it consistent with the evidence - at worst against us - and indeed considering even his Honour's finding, that one of the incidentals of the agreement was that it would bring to an end the threats? That is all that is necessary. It may be that more logically I should be putting to your Honours his Honour's finding on this.

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JACOBS, J.A.: It seems you are arguing onus. You left onus and went to an entirely different subject matter, namely the degree of effect that the duress needs. If this is your treatment of that, then I would be sorry, Mr. Gruzman, because I thought you would treat it separately and in a different way; not mixed up with onus.

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MR. GRUZMAN: The course which my address has taken

is to just go through these cases which are in this volume - which are collected and extracted - and refer your Honours to passages only and then to come to the basic submissions on them subsequently.

JACOBS, J.A.: It is different from the usual way. It is a bit like your argument on the facts. I would, like my brother Mason, prefer that you enunciate your submissions and support them from the authorities, but do so in your own way. It seems to me that you are now enunciating two propositions in the same way (1) that the onus changes and (2) that the element of causation does not have to be a dominating one or the sole one or anything of that kind. If you are putting both of those and then simply going to the cases, there is not much more to be said.

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MR. GRUZMAN: I do not cite this case on the question of onus. What I cited it on was to show that if one element was an unexpressed understanding between the parties that the signing of the agreement would end the illegal conduct, that is sufficient. That was the purpose of the citation of this case.

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JACOBS, J.A.: Then you have done with that case? Could you indicate the general subject matter for which you cite the next case?

MR. GRUZMAN: Your Honours, there are some more legible copies of those principles which I handed up previously. (Produced to Court.)

The next case is Spong v. Spong, 18 C.L.R. 544. This is a case of onus and relationship, a decision of the High Court. It expounds the principle of the generality, the openness of class of relationships which attract the equitable principle. Equity does not tie itself down to any formal class of relationship, the multifarious relationships of contracting. At page 552, where Isaacs, J., says "Of course the relationship must have reference to the matter in dispute ... in my opinion fails". Rich, J., said (read). It has been one of our submissions that the relationship between a man who has been the subject - I will use the phrase - of a reign of terror - and I use the phrase because it implies what we say - from another man is in relationship to him and it is the kind of relationship, par excellence, the strongest kind of relationship which must really affect the man's mind and therefore the one most easily bringing into play the equitable principles.

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TAYLOR, A-J.A.: If you are on onus now, what you are saying is not that the trial Judge was wrong - that he applied the correct onus in the case of duress on the case made before him - and we do not know what he would have found on this case. He might have been prepared to make a finding in the defendant's favour even if he had the onus on the question of the relationship between threats and the end execution of the document. How do we resolve that difficulty?

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MR. GRUZMAN: The way it is resolved is this: this is a Court of rehearing. Your Honours sit here as the preliminary judge of facts.

TAYLOR, A-J.A.: I know that. You say we have got to make our own finding.

MR. GRUZMAN: Yes.

JACOBS, J.A.: For that purpose we do accept his Honour's finding as to the credibility of witnesses?

MR. GRUZMAN: In so far as they depend on demeanour, yes. 10

TAYLOR, A-J.A.: We either accept them or we do not. You say if the findings were restricted to demeanour only those are the only ones we accept?

MR. GRUZMAN: The only findings this Court cannot alter are findings of credibility based on demeanour.

JACOBS, J.A.: Based wholly or partly on demeanour?

MR. GRUZMAN: Those findings on demeanour are the only ones that the Court must accept. For example, in the High Court, each of their Honours spent hours and hours discussing the minutiae of the facts and each came to his own conclusion irrespective of the finding of the trial Judge. 20

TAYLOR, A-J.A.: That was the issue fought before the trial Judge. Mr. Justice Taylor allowed them to amend and make a fresh case and the case was fought before him, as it was with the High Court hearing. As I understand it you want us to say here that this case should be reheard de novo, and we are the first judicial tribunal that is going to pronounce on it? 30

MR. GRUZMAN: Yes, and the House of Lords in the Ashburton Case was the first tribunal to try the issue raised before it. The House of Lords there was the first tribunal and had no information on this issue, none from the trial Judge, none from the Court of Appeal, and for the very first time that issue was raised, tried and determined on appeal in the House of Lords.

TAYLOR, A-J.A.: But on this case of whether there was or not influence used that we are debating, I would have thought the primary thing would be: what impression did the man make, what sort of a man was he? We have not seen him. Mr. Justice saw him for fifty-eight days. If you were called on to decide did these threats induce this man to sign this contract or did he enter into it for other or different reasons, one of the main things you would concern yourself with, I would think, would be to make a judgment of the man. Is he a weak man or a strong man, a man who fights back? How do we know anything about this? That is the impression you would get, I suppose, not only from the evidence he gave but also from how he reacted in the witness box 40 50

and you would have to make your judgment about it. Are you saying that we had to make our judgment of this man?

MR. GRUZMAN: Yes, your Honours have to make a judgment on the evidence.

TAYLOR, A-J.A.: The main bit of evidence is missing, that is the man.

JACOBS, J.A.: And "was he a frightened man"?

MR. GRUZMAN: Yes. His Honour found so. His Honour found that he was a frightened man and once his Honour made that basic finding --- 10

TAYLOR, A-J.A.: "Did he frighten easily?"

MR. GRUZMAN: He did not have to frighten very easily under the pressure his Honour found. His Honour found he was in very real mental torment, and your Honours can look at him for quite a long time without being able to improve one way or the other on that finding. He was a man in very real mental torment. Where his Honour basically, in our submission, went wrong was firstly in his evaluation of the commercial situation, which your Honours can do just as well as his Honour did because you have got the same evidence before you. That does not depend on demeanour. You have got the facts of life, what the Americans call the financial posture of the company - that is a fact of life - explained to your Honours in the evidence. Your Honours are just as capable as was Mr. Justice Street of making a finding on that, in fact more capable because before his Honour the issue was not argued as it has been before this Court. For that reason, because we did not before Street, J., delve into the commercial situation in the belief that the pressure and the threats would have overcome any commercial consideration, his Honour did not have the benefit of the submissions and the examination of the evidence on the commercial situation that you Honours have had. So your Honours are in a much better position on that. And that, so understood, your Honours will be able to first of all say "Was this such a commercial deal as a man would normally have entered into?" Our submission is that it was a shocking commercial deal. Once your Honours came to that view there would be no room left for the decision that his Honour came to. 20 30 40

Then there is the second point, and that is if a learned trial Judge makes a finding which appears to be contrary to ordinary human behaviour, it is for the Court which has the power and duty of re-trying the facts to see whether that finding is justified by the evidence. When his Honour found that although this man was in terror, if he had so found, that it had no effect upon him when he signed the contract, then this Court is entitled to say, "We will look at this more closely". 50

It is in the same way that Kitto, J., looked at the details of Bromley's Case, what he did,

and every time he had a drink and every time he walked in the street, the colour of his clothes and how many times he washed them, and so on. Having done so - never having seen Bromley or Ryan - his Honour came to the conclusion that the trial Judge was quite wrong and said so; the whole question being undue influence.

TAYLOR, A-J.A.: In doing so, Kitto, J., was wrong, was he not?

MR. GRUZMAN: He was in the minority.

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Now nobody has said that his process was wrong. Nobody disputes his Honour's power and he performed his judicial duty, because the other judges did the same thing. Each of the three judges went into the most extreme detail and each of them came to the conclusion, based on the facts, and not until after they had decided the facts did they then look at the trial judge's findings and say "We agree with the learned Trial Judge". But each of them performed the task of examining in extreme detail - and I use the words "extreme detail" - every aspect of the evidence. Having done so, two of them came to one decision and one came to the other but they all followed the same process and it is a process which we respectfully submit that each of your Honours should follow.

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Johnson v. Buttress, 56 C.L.R. 113, in the High Court was also a case where members of the High Court followed exactly the same judicial process because that is, with respect, the judicial process to apply in cases such as this.

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I am going to refer your Honours to the next case of Morley v. Loughman, only. It is really an example - it is an Exclusive Brethren case. One of the arguments at page 749 was *res ipsa loquitur*, which your Honour Mr. Justice Taylor would recognise, I am sure. About one-third of the way down that page it appears. I think, if I remember, one of your Honours put it to me earlier - am I suggesting that? And I do.

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JACOBS, J.A.: What he is saying there is that the evidence was so strong that only one conclusion was open, "I cannot prove the exact fact but the circumstances all lead to that conclusion". Then he went on to say, "Even if that were not so there is in fact a beneficial relationship". That puts it into two classical ways.

MR. GRUZMAN: It just sets out the law at the bottom of page 751. There is no doubt on the law - "It is illustrated by the numerous cases ... doing that". That was a case concerning a gift, because it was a large gift you say "explain why you got it?" In other words, if your Honours came to the conclusion that it was an improvident contract in this case, as we submit it clearly and grossly was, we invite your Honours to say, "How do you explain this?" In this case capacity and knowledge are

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not disputed. "Proof may have been ... or some equivalent circumstance". Again they say "The peculiarity of these cases ... by which dominion may be exercised by one person over another". And so far one does not find any restriction on that rule, we submit - as we have been submitting before - that par excellence the type of relationship is where one man believes that he owes the continuance of his life to the other.

One other point I might mention is that, to save coming back to this case later, here the evidence was destroyed. At page 68 of the book: "Under the circumstances the defendant cannot complain if the most unfavourable inferences are drawn and I think I ought to draw them ... religious brotherhood". Then six lines from the bottom, "It is a ... might in fact be set aside on the ground of public policy".

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The next case is on presumption of continuance.

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JACOBS, J.A.: I do not wish to keep repeating this but I see at page 752 this problem is stated by the trial Judge, "What I have to decide is is there proof of undue influence which produced the gift ... comes within the rule".

MR. GRUZMAN: It is because of that traditional approach that we have submitted to your Honours that what he resisted was a relationship - not a relationship of any kind that appears in the books - and the reason why it does not appear is that either people get killed or it is a police matter. We will take your Honours to cases which we will cite, one in Nazi Germany, but we have found nothing remotely like this case. We cannot find one case in the books for or against, or anything else, remotely like this case, and all these cases pale into insignificance and are drawn on tenuous little threads to try and establish that there was some relationship between the people. Indeed, the case before your Honour is an a fortiori case of the strongest possible kind.

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Rhodes v. Bate, is authority for the proposition that once you have found the relationship you assume a continuance. Here was a relationship case. At page 75 of the book they say, "Much of the evidence on the part of the plaintiff is directed to her being of a weak mind, which is not even ... no doubt she understood perfectly what she did, however she was under the influence". At page 79: "I think that where the relation of ... there being no occasion to resort to it". Just in passing, and to avoid coming back to the case again, at the top of page 78 the question of agency is considered. "But Stephens was the general agent of the appellant and without going to the length of saying that the appellant ... the principle of reliability", and Hume, we submit, was for this purpose an agent of Armstrong.

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Cooke v. Lamotte is simply a case of the

principle that if there is a voluntary giving, or an improvident contract, we would say, then that in itself is sufficient to call upon the recipient and the other contracting party to prove that the transaction was righteous. It is a strong case on that point and in fact there seems to be very cogent evidence that this aunt gave this bond to the nephew in a very considered way and made entries in her books that she had done it. Yet the Court set it aside. At page 530: "I shall endeavour to explain the grounds upon which I proceed ... one may obtain considerable influence over the other". That is a statement of principle which we submit is of major importance in determining whether there is a relationship here, "The relation in which dominion may be exercised by one person over another" - that applies to every case in which two persons are situated and one may obtain considerable influence over the other. At the risk of repetition, this case is a prime example of such a relationship.

There are two other points mentioned in the case. About two thirds of the way down they state a rule of equitable jurisprudence which enforces the principle of morality throughout this case - public policy and morality and so on.

The second point again referred to is: "In this case, in accordance with the opinion I have stated on the principles ... the instrument cannot stand".

The third point upon which we rely: "It is necessary to ... that the thing is righteous". In other words, if Armstrong puts Barton under threat and pressure, Armstrong by so doing takes upon himself the whole proof that the thing is righteous.

Ellis v. Barker - we do know that in America duress is said to be much wider and to extend to duress of goods. This is a case of duress of property under the English law. What happened was that under a will the legatee had a right to occupy a farm and to obtain certain other benefits. The result on the estate was that the legatee would have to meet certain commitments and there would be nothing left over them. The question was whether he could be accepted on the farm depended on the Land Board, so they went to the Land Board and explained the position, and it says, "In effect ... make provision for his relatives under the will".

MR. GRUZMAN: This was a suit to set aside the deed, said to be under duress and coercion. The Master of the Rolls heard the matter. They got an opinion from counsel previously and they had been told they should not pressure him but they did, and at page 605 it says:

"Afterwards the defendants Barker and Godfrey ... desired".

The facts are set out and at page 606, the right hand column:

"The plaintiff complained of this transaction and the question is whether the arrangement thereby established can stand. I am of opinion ... are concerned."

JACOBS, J.A.: In this case it is strictly coercion.

MR. GRUZMAN: Coercion of goods by relation to property. Over the page at 607 in the left hand column it reads:

"The other argument is that no coercion was exercised at all ... and one for which he would have given much money." 10

In the right hand column it says: "... then it becomes duress".

On appeal the judgment was upheld.

The next case is a United States case and I would like to refer your Honours to 6 in the left hand column: "To constitute duress it is sufficient that a will be restrained by the unlawful presentation of a choice between comparative value ... and unconscionable demand". 20

TAYLOR, A-J.A.: What was the case that you referred to?

MR. GRUZMAN: Ward v. Scarborough. What has happened is that the American law has developed and if this very case is based on an English authority, as well as many American authorities, we submit this definition of duress, "that the will be restrained by the unlawful presentation of a choice between comparative values", is as much the law in New South Wales as it was in the United States. 30

We now come to the case of Bromley v. Ryan. This is a case on which I am going to spend some little time. First of all, the basic facts were that Ryan was a man who had been addicted to liquor for many years and he spent most of his time well under the influence of liquor. He had a property and apparently he had had in mind selling it for some twelve months. His asking price was £9. an acre, which made an asking price of about £33,000. Bromley was, I think, a local grazier and his father really wanted to buy it for him and negotiated the sale and they saw this fellow Ryan. They saw him over a period and there was apparently little in the way of negotiation. This happened in northern New South Wales. Eventually they went to the office of the solicitor Rogers. Rogers acted as solicitor for both parties, for Bromley and Ryan. While the matter was under discussion in his office he wanted Ryan to see his accountant and he rang Ryan's accountant and Ryan went to the accountant's office and discussed the matter with the accountant and then came back with a piece of paper in the accountant's handwriting making certain calculations, tax and so on, and dealing with the price of £25,000. He was not drunk at the time, he was sober; he understood, as the trial Judge found, what he was doing. 40 50

He understood that he was signing a contract and was selling for £25,000. He understood what he was doing so the contract was not vitiated by lack of assent. It was in those circumstances it was sought to set this contract aside. In fact, that was not even sought, as one might imagine, on those facts. When Bromley sued for specific performance Ryan resisted and he resisted on the ground there had not been the proper consent of the Minister and one or two other matters.

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The case was argued for many days before his Honour Mr. Justice Taylor and there was a not insignificant bar appearing for the defendant; Sir Gordon Wallace, Sir Nigel Bowen, Mr. Meares, as he then was, and Mr. Ellicott. Somehow or other nobody noticed the point which his Honour Mr. Justice Taylor observed when he started to consider the facts.

Having come to a certain stage in his deliberations he felt there were grounds upon which the whole contract could be set aside. Indeed, I understand he was minded that he would have to find for the plaintiff in damages unless something was done about setting aside the contract. In those circumstances he recalled the parties before him and indicated to some extent his then views and as a result counsel for the defendant sought and obtained an amendment.

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It was by this amendment for the first time there was introduced into the case the concept of setting aside the contract on equitable principles. His Honour then invited further evidence. The plaintiff rested on the evidence they had already given. The defendant called some further evidence. His Honour then found subsequently in favour of the plaintiff on this newly created issue. One of the grounds of the appeal was that the amendment should not have been allowed.

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One of the important matters, of course, is that the whole transaction took place in the presence of a solicitor. One of the significant matters in the case was that the transaction took place in the presence of a solicitor.

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MASON, J.A.: The actual contract?

MR. GRUZMAN: Yes, it was executed in the solicitor's office with some comings and goings.

MASON, J.A.: The defendant was not feeling very strong about it.

MR. GRUZMAN: The solicitor never saw anything wrong with him.

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TAYLOR, A-J.A.: The Judge did.

MR. GRUZMAN: What their Honours said was the solicitor was not very observant. He was acting for both parties.

TAYLOR, A-J.A.: The agent had gone in to see him, the father, the night before, or something like that, to draw up the contract.

MASON, J.A.: The purchaser has guided him down to the solicitor's office.

MR. GRUZMAN: Yes, but he was not under the influence of liquor.

The case is quite interesting because it indicates how far this equitable principle goes. I am safe in submitting this must be a case where certainly minds would differ on it, as great minds did in the event, and it therefore is significant in looking at what were the principles. There was nothing in it of a contrived situation. In other words, Bromley did not get Ryan drunk and take him down to the solicitor's. 10

TAYLOR, A-J.A.: He did not have to.

MR. GRUZMAN: He did not, and he was not drunk.

TAYLOR, A-J.A.: That is not the situation, that is the start of the situation. Bromley took him to the solicitor's office when this silly old man did not know what was going on. That was a fact that was obvious to Bromley. 20

MR. GRUZMAN: It does not go that far. If he had been taken down to sign something and that he did not know what was going on ---

TAYLOR, A-J.A.: It does not say that he did not know what he was signing.

MASON, J.A.: At 375: "He had no knowledge of the events of the previous day or of the real value of the property. If he had possessed this knowledge I think it is probable that agreement would not have been signed that day or at all". 30

MR. GRUZMAN: His Honour makes that finding but, of course, the fact was, as Mr. Justice Kitto pointed out on the evidence, he had been trying to sell the property for approximately 12 months at that price.

TAYLOR, A-J.A.: You want to take the most favourable event in this case? 40

MR. GRUZMAN: With the greatest respect to your Honour, Mr. Justice Taylor, I do seek and I hope your Honour will look at the process by which their Honours on appeal in the High Court arrived at their determination of the facts because I seek that your Honours here will apply some such process, and that is why I am looking at the facts on both sides.

TAYLOR, A-J.A.: I am not questioning you in doing that. I am saying if we are to accept the facts it is more appropriate, is it not, to accept those facts upon which the decision was based; those are 50

the ones founded by the trial Judge and by the majority of the Court of Appeal.

MR. GRUZMAN: When I make my submissions on the principles I naturally agree, but the first point I seek to make is the way in which an appellate Court, in a case such as this, and acting on the principles which are applicable to this case before your Honour, acts on dealing with facts and that is why I am pointing out some of the opposing situations of fact and looking at the manner in which their Honours in the High Court dealt with it and resolved it. 10

Whereas his Honour the trial Judge finds that he did not know what was going on as to the value of the property the fact was, as his Honour Mr. Justice Kitto said, he had been trying for 12 months to sell it at £9 an acre and had not been able to. He had certainly been discussing the sale of the property.

It is interesting to have a look at the arguments of the learned counsel who appeared in the matter just to see what the issues were before the Court of Appeal. Mr. Macfarlan, as he then was, submitted there was here no relationship of influence of a kind calling for the intervention of a Court of Equity. He said the respondent carried the onus of establishing the facts from which the Court could say there had been an unconscientious use of power, and this he failed to do. Mr. Justice Taylor found that sickness, age and illiteracy coupled with under value was sufficient to set aside the transaction but he failed to consider those facts upon the appellant or to inquire whether there had been an unconscientious use by the appellant of some existing relationship between them. 20 30

His Honour Mr. Justice Fullagar then put a proposition which Mr. Macfarlan must have thought was his way, but it just shows how careful one has to be. Mr. Fox was arguing about the amendments. Mr. Bowen said: "The jurisdiction to set aside unconscientious bargains is one which has not been limited by equity ... equitable relief". 40

He cited a large number of cases all of which, except one, are additional to the ones that have been cited in this Court by us and he submitted: "The common features present in this case are ... to the stronger".

He went on to argue other matters; that the appellant did not come with clean hands.

As I have mentioned, Mr. Justice McTiernan's judgment proceeds for 20 pages within which his Honour deals very extensively with the facts. At page 382 he said: "An issue in the case is whether they met the respondent upon equal terms". 50

Halfway down the page he said: "The respondent alleged that in the negotiations for the purchase of the property ..."

JACOBS, J.A.: But there was no relationship between the parties in Bromley v. Ryan.

MR. GRUZMAN: No relationship?

JACOBS, J.A.: There was no relationship, there was no exercise of influence, there was the coming-upon a man who was not fit really to control his own affairs, and a taking-advantage of that situation to the man's disadvantage. That applies in a number of different situations; old ladies, drunkards, people weakened by age generally, and expectant heirs, but they all depend on finding a man in an objective weakened condition. 10

MR. GRUZMAN: Weakened mentally?

JACOBS, J.A.: Yes, so he is not capable of making a bargain generally, and taken with due regard to his own interests.

MR. GRUZMAN: We would add to the list people in a state of mental torment and great fear. We would say "Yes, we accept what your Honour says but the only thing is the list is not closed". 20

JACOBS, J.A.: There is no list on this subject. It is not undue influence, there is nothing to do with undue influence or duress.

MR. GRUZMAN: All it is is a case of a man who for one reason or another ---

JACOBS, J.A.: Is weakened in mental power?

MR. GRUZMAN: Yes, and particularly vis a vis the person concerned.

JACOBS, J.A.: Not particularly. Often you get a different situation when they are weakened vis a vis the person concerned but this type of case is dealing with a person whose mental power is weak either from hereditary, from youth, from age, from drink, or whatever it may be and if you see that he is in that situation you may be able to make a contract with him at law but equity is more tender towards those persons. 30

MR. GRUZMAN: I do not know of a case where the two parties have been equally weak.

JACOBS, J.A.: Ex hypothesi, it is a bad bargain. 40

MR. GRUZMAN: Bromley was normal and Ryan was affected in one of the ways your Honour has mentioned, but what would the Court do if Ryan met his counter-part? Say, if two old drunks get together and make a deal?

JACOBS, J.A.: You may point out the logical defects but that is all; it is more a defect of human reasoning. In fact, it does not play a part in the principle.

MR. GRUZMAN: Our submission is that it does. We 50

submit the thread running through the cases is the superiority or domination; the meeting together where one is stronger than the other, and that is the thread, and if they were equal then equity, on principle, would not interfere.

JACOBS, J.A.: A young expectant heir can make an unconscionable bargain with another.

MR. GRUZMAN: Yes, because the principle is to protect the weaker from the stronger. There is no case in the books, so far as we have seen, where two people are equally deficient where the Court has had to consider it, but on principle every case speaks and, indeed, this very case. 10

JACOBS, J.A.: It is understandable that is what you would find because the other weak man would not have the wit to take advantage of the situation.

MR. GRUZMAN: Lord Justice Lindley said: "What is the principle? Is it ... in my opinion the doctrine of undue influence is found upon the second of these two principles". 20

JACOBS, J.A.: A person must have the wit to take advantage of the situation, but subject to that there is nothing more. He does not have to be old or young. A young expectant heir might have the wit to take advantage of another one and it still would not stand if he had that wit.

MR. GRUZMAN: It is not a case of that, I would not have thought, with respect. At page 385 his Honour Mr. Justice McTiernan said: "In the present case what is alleged in the defence in support of the counter-claim ... weakness on the other". 30

JACOBS, J.A.: That is precisely what I was putting to you. You have to find weakness on one side and advantage taken of it. There is no relation between the two.

MR. GRUZMAN: For the purpose of this submission I am not putting relationship. This is a different matter. Bromley and Ryan is a case which says that where two parties meet together, and it does not matter, they meet or may have met for the first time, but one is weaker than the other. That is all you need, nothing else. 40

TAYLOR, A-J.A.: That is not right; one weaker than the other. One has got to be so weak he cannot look after himself, he cannot make a rational decision.

MR. GRUZMAN: It does not go that far. I agree with your Honour it is not a case that one is a little bit less than the other but I am taking the equitable principle as enunciated by Mr. Justice McTiernan in this very case. 50

TAYLOR, A-J.A.: Unless he is so weak that he cannot look after himself there is nothing of which you can take advantage.

MR. GRUZMAN: If he could not look after himself at all, he could not make a contract. He had a weakness qua this person. That is what his Honour said. He said, "The equitable principle is weakness on one side, advantage taken of it on the other".

JACOBS, J.A.: Irrespective of the relationship, and I am not using that in a technical sense, between the parties? Once you find a relationship such as duress, undue influence, you move into a different field. You are painting a picture of Mr. Barton as a man in mental torment so that he was a straw in the wind; he was incapable of being regarded as a man who could conduct his own affairs generally? 10

MR. GRUZMAN: Vis a vis Armstrong?

I understood Mr. Justice Taylor to suggest I was putting the principle of the parties meeting to comprehend all of the cases, every one of them. If A meets B and whether it is because of a pre-existing relationship or not, but when they actually meet, A vis a vis B is stronger in a sense and advantage is taken of it, and that is all you need. 20

JACOBS, J.A.: You can establish that by showing a relationship between them.

MR. GRUZMAN: That is one way.

JACOBS, J.A.: If the man is not a straw in the wind and A, Ryan, or an expectant heir, or an old lady, if he is not one of those but can be taken advantage of generally, you have got to show a particular situation between the parties where one overbore the other, or was capable of overbearing the other, and once you put it in that language you are into a relationship of influence. 30

MR. GRUZMAN: One could have it, and the same facts might have met of both situations. Let us suppose a person has been locked up and kept in subjection for months. Let us suppose it is an obvious relationship case and, for example, let us suppose he gets out and he is out for a few days and then they meet and make a contract and he still has his fear of this man. You could regard it either as a relationship case and a continuation of the relationship or you could regard it as a Ryan case. 40

JACOBS, J.A.: Just as though anybody else came up to him and said: "Oh, you have lost your will, now I am going to take advantage of you"?

MR. GRUZMAN: I can see the difference between what your Honour is putting to me and what I am putting to your Honour. What I am putting is that the weakness may be general when the two parties meet or it may be specific; that is weakness vis a vis this particular man. I think I understand your Honour to be putting the principle laid down in Bromley is a general weakness. 50

JACOBS, J.A.: Weakness towards the world generally

known to a party who preys on that weakness. The other type of case may be weakness towards a particular individual generally and that individual preys on that weakness. That involves a Johnson v. Buttress situation; weakness towards an individual generally is a relationship in which a person generally has an undue influence over a person.

MR. GRUZMAN: The basic difference in what I am submitting and what I do submit is this; and this is our submission; it is sufficient to attract the equitable principle that when the two parties meet that between those two parties --- 10

JACOBS, J.A.: Generally?

MR. GRUZMAN: Yes, generally; that between those two parties there is a condition of superiority and weakness.

JACOBS, J.A.: Generally?

MR. GRUZMAN: Between those two parties. It is simply because at the given moment A has this relevant superiority to B. 20

JACOBS, J.A.: I would agree with all that if you can show that A dominates B generally; then you have got a situation of influence and if you find a taking of advantage of that situation you have got the same principle as in Bromley v. Ryan but in its different manifestation, but you have to allege and prove that he had that influence generally over the other man.

MR. GRUZMAN: We would extend the principle to this situation; Supposing A, being a normal individual, meets B, and to illustrate the point, who is a very big and powerful individual; they had not met before, and the very big and powerful individual says, "Sign this" and A, being fearful of him, signs it. We would say that meets the principle. In other words, A would not be frightened of anyone else in the world, if you like. 30

TAYLOR, A-J.A.: What about the next big man who came along?

MR. GRUZMAN: One has to find an application. 40

JACOBS, J.A.: I would say that is a straight case in which the duress or influence might be inferred from the surrounding circumstances.

MR. GRUZMAN: That may be so.

TAYLOR, A-J.A.: Suppose you have a little man with a gun; what is the difference?

MR. GRUZMAN: None.

TAYLOR, A-J.A.: That is a plain case of duress.

MR. GRUZMAN: Yes, but if he has not got a gun it is not such a plain case. 50

TAYLOR, A-J.A.: It is not general fear, it is only fear when he has a gun.

MR. GRUZMAN: Bromley, for example, does not seem to require general fear. If you have got general fear you can go to 100 other authorities; you have a relationship. If you have not got general fear, if you have only got fear at the moment you can go to Bromley.

JACOBS, J.A.: You have in Bromley's Case the widest of all, that is debilitation and incapacity to deal with anybody in the world, falling short, however, of legal mental capacity and the taking advantage of that situation. 10

MR. GRUZMAN: In all the other cases; for example, Johnson v. Buttress, there is no suggestion Johnson was incapable of dealing with his affairs generally vis a vis the rest of the world, the only suggestion was there was a relationship to Mrs. Buttress and her family.

JACOBS, J.A.: That is why I said the next step after Bromley was such a case as Johnson v. Buttress where, although it was not a traditional relationship generally between them, there was a relationship of dominance and subservience; therefore, a presumption of those. 20

MR. GRUZMAN: In further answer to your Honours; this principle that to attract the equitable doctrine a person has to be weak against the world - "weak", that is below normal - I put it if A is normal and B is superior that is enough. I understand your Honour Mr. Justice Jacobs to be saying it is necessary for A to be below normal for the doctrine to work. 30

JACOBS, J.A.: Yes, I think I did. What do you say on that?

MR. GRUZMAN: That, first of all, has never been said and secondly, it seems to be contrary to all those cases, for example heir cases.

JACOBS, J.A.: They are below normal ex hypothesi, the expectant heir. 40

MR. GRUZMAN: The Earl of Janssen was 30 years of age and a perfectly normal individual and led a very gay life.

JACOBS, J.A.: The gayer the person, the weaker; because he needs the money, vis a vis anybody who will lend him money or to whom he can sell his expectancy.

MR. GRUZMAN: Once we come to that haven't we given up the idea of weakness against the world?

JACOBS, J.A.: I said through youth, age, drink and so on. 50

MR. GRUZMAN: The only point I am addressing

myself to is whether that means they have got to be weak or against the whole world or weak vis a vis the individual with whom they are dealing. Once one thinks of the expectant heir cases, you have a man of perfect mentality, perfect sense, travelling the world and spending thousands and thousands of pounds a year and perfectly able to hold his own anywhere except vis a vis ---

MASON, J.A.: His weakness is that he is in desperate financial straits and therefore likely to be induced to part with his valuable inheritance. If you look at the judgment of Mr. Justice Fullagar in Bromley's Case his Honour there states, almost in the form of a list, the various weaknesses and although eventually he refers, of course, to the situation of A vis a vis B, quite clearly he puts it on the basis of enumerating the disadvantages which reduce people to below the normal of which one would expect, so one could say of them that they need assistance or explanation where that is necessary. 10 20

MR. GRUZMAN: If your Honour reads on further, his Honour then draws a common characteristic.

MASON, J.A.: Yes. Of course, the common characteristic being all such people think when you deal with other normal people they will be at a disadvantage vis a vis those people.

MR. GRUZMAN: The characteristic which he draws out is that they have the effect of placing one party at a certain disadvantage vis a vis the other.

MASON, J.A.: That is the result when you are concerned with a contract between two people. 30

MR. GRUZMAN: Yes, but the question being then, supposing one can simply say one party in this particular case was at a serious disadvantage, vis a vis the other. Would not that fall within the principle? These are only examples of the principle.

MASON, J.A.: I would have thought not. For example, you were selling a grazing property and it transpired you as a stronger person did not have a knowledge of prices and suitability of properties for particular use as compared with the purchaser, and it was established that he had a better knowledge than you, in one sense a situation of disadvantage will exist, but do you mean to tell me the principle of equitable interest is established? Absolutely not. Rarely is it on a true and fine balance each party has the same expertise in relation to the same subject matter of the contract. 40

MR. GRUZMAN: Perhaps there is something more. The only submission we make is this: it seems on all the cases it does not matter. Once one puts the expectant heir case in, and you can put the expectant heir case into that; and his Honour has not mentioned it, you can put it into that same category. 50

JACOBS, J.A.: It is there.

MR. GRUZMAN: Say you have a man who all the world would regard and if you saw him in the witness box he would be a fine upstanding fellow and able to hold his own and no deficiencies of any kind; only one, that he was short of money, so all that is wrong with him is that he is short of money, and the only time that comes into play is when he is dealing with a money lender.

JACOBS, J.A.: No, when he is dealing with anybody who tries to take his inheritance for money. 10

MR. GRUZMAN: They say the common characteristic is that he goes to the money lender.

MASON, J.A.: What happens if he sells outright; the same thing?

MR. GRUZMAN: But the principle is whether between A and B, and that is what the Court is concerned with, there is a position of superiority on the one side and inferiority on the other.

JACOBS, J.A.: In the particular transaction?

MR. GRUZMAN: Yes, that is what the Courts are concerned with. We submit there is no case which says otherwise, and it does not matter, and that is the simplicity of it; it does not matter how that arises, whether the people have just met. Take, for example, that one speaks of general superiority, or whatever phrase Your Honour Mr. Justice Jacobs used, that had to start somewhere. What about on the first day it turned into something or the first day it started. In other words, it could start straight away. Your Honours have heard of love at first sight; I suppose one can have the opposite, one can have a situation of fear at first sight. 20 30

JACOBS, J.A.: Fear generally?

MR. GRUZMAN: Of a particular person.

TAYLOR, A-J.A.: If you have got a fear of a particular person that surely is a case of influence or special relationship and this is your real difficulty. You try and make here a case that Barton was in some way disadvantaged when it came to making contracts. He was an astute businessman so what you have got to do or say is he was disadvantaged in making this particular contract; disadvantaged because he had been threatened by Armstrong? 40

MR. GRUZMAN: Yes.

TAYLOR, A-J.A.: What you really mean is either a special relationship between these two men, one man to overbear the will of the other or you are making a case of duress. In Bromley v. Ryan the man was not fit to make a bargain with anybody; in equity. 50

MR. GRUZMAN: The way one uses Bromley v. Ryan is

this; we are searching for the principle, we are looking for the principle to apply to govern Barton and Armstrong and to find the principle one looks at what the Judges have said in other cases and then looks to see is there a common principle extracted which would cover this case.

TAYLOR, A-J.A.: What about looking at the facts?

MR. GRUZMAN: I am looking at the principle.

TAYLOR, A-J.A.: You are talking about Barton and Armstrong, you have to look for a principle to apply to the set of facts. 10

MR. GRUZMAN: In each given case, but the Court lays down the principle and our submission is what was laid down in terms by their Honours in the High Court is that if two parties meet and for whatever reason A is in a position of superiority to B, and if you add to that, Mr. Justice McTiernan would say, "an unconscionable contract" or Mr. Justice Fullagar would say, "without any unconscionable contract", you would set it aside. 20

JACOBS, J.A.: Undoubtedly it reflects a single policy of equity, the whole of the doctrine does but if you put the policy broad enough, so does all forms of equitable fraud become part of a general policy of equity. There is this policy but like all generalisations, in English law they are subject to analysis because they are only conclusions from particular situations that arise and you cannot rely on the broadest of generalisations. You draw this conclusion of this principle of public policy from the fact in relation to this class of case equity acts this way, and in relation to another it does this, and so on but unless there is a principle that equity in cases of duress will interfere without direct proof; in cases which may be cases of duress, that is the big man over the small man, the man with the gun, will interfere in the absence of proof that the duress was operative, it is not much use going to some broad concept of public policy. 30

(Luncheon adjournment). 40

UPON RESUMPTION:

MR. GRUZMAN: If I may address your Honour Mr. Justice Jacobs for the moment. My submissions are of more use to your Honour if I understand what your Honour is putting to me. May I suggest to your Honour what I understand your Honour said before lunch that, in effect, firstly, duress cannot succeed unless it operates? Duress as a proposition will not lead to the plaintiff's success unless there is proof of its operation. Secondly, that on his Honour's findings the duress did not so operate, and that it followed, without altering his Honour's findings, we could not succeed. 50

JACOBS, J.A.: On the matters before his Honour and in the pleadings, as I understand it.

MR. GRUZMAN: Alternatively if his Honour's findings were altered in a material sense that it would just be common law duress anyway.

JACOBS, J.A.: Yes.

MR. GRUZMAN: Or alternatively to alter his Honour's findings one would have to alter the onus.

JACOBS, J.A.: I did not say that.

MR. GRUZMAN: I do understand what your Honour was putting to me. I appreciate the force of it. The way that we are putting our submissions is this: 10
Firstly, in the course of these submissions I have discarded the pleadings before his Honour.

JACOBS, J.A.: I follow that.

MR. GRUZMAN: In due course I am going to say if we have the amendments we can show an arguable case. I understand your Honour also was putting that to alter the onus we would have to show either a relationship, as understood by the cases, or a position of superiority.

JACOBS, J.A.: Or for the operation of the particular document which is exemplified by the statement that if you take advantage of a person who is in a position of inferiority then the transaction will not be allowed to stand. 20

MR. GRUZMAN: Basically, if I may so put it, we do not find ourselves differing substantially from those matters your Honour has put.

JACOBS, J.A.: No, only in categorisation, only in the categorisation of whether this could be a case in the last kind that we were referring to, whether this could be properly regarded as a case of an unconscientious use being made where the other party is in a situation is disadvantage. To repeat, I was saying that wide statement must be limited to the class of case with which it has been dealt. It can subsume the whole law relating to undue influence having to be proved as a fact in certain cases or duress having to be proved as a fact in other cases. 30

MR. GRUZMAN: As I see it the way our submissions differ from that of your Honour is on that last question, and the essential difference is that our submission is simple. We say if the situation of superiority is relevant, that is if as between A and B, A and B has a relevant superiority, that is all that is required and it does not matter that B, against the whole of the rest of the world, is superior to them. If A is superior to B in a given situation in this relevant sense then it makes no difference that B is superior to the rest of the world in another situation. 40 50

JACOBS, J.A.: I do not think that is necessarily consistent with B still having a difficulty.

MR. GRUZMAN: For example, I notice in Mr. Justice McTiernan's judgment in Bromley's Case, his Honour said at page 392, halfway down the page: "The respondent being in possession of this valuable grazing property ... advantageous to the Bromleys".

JACOBS, J.A.: He was generally exposed to imposition and overreaching.

MR. GRUZMAN: His Honour takes it in two points there. Supposing he was dealing with Ryan's contract with his shearers. It does not mean that the law does not regard any contract of Ryan's as a good contract. 10

JACOBS, J.A.: The shearers would not have taken advantage of it.

MASON, J.A.: Or alternatively he may not be in a position of weakness so far as entering into a shearing contract is concerned.

MR. GRUZMAN: Exactly. This is our submissions. I take the first one first. His Honour presumably would not have said that relatively to the shearers they had great bargaining strength and could dominate his will, or one could imagine that was not so. If not the shearers, taxi drivers or somebody else; so at least it is true in this case he was exposed generally but that is not the real question, in our submission. The real question is relatively to the person with whom he was contracting, was that person, by reason of all the circumstances, in the position of superiority. 20

JACOBS, J.A.: It just could not be that that is the law because how many people meet the salesman, the man who can really get people to do what they otherwise have not thought of doing, buying a mind. I am not talking about fraud or any of those things; they are just good at it and are taught for years in establishments how to be good at it. I think one is often jelly in the hands of those people, and that is a situation where you and I or Mr. Horton or any of us can be exposed to imposition and over-reaching. Equity cannot help. 30 40

MR. GRUZMAN: I do not want to go into this in detail, but one knows it has been necessary to pass an Act of Parliament many years ago to say the lady who has been over-reached by the salesman without fraud can set the contract aside. We would submit that is a question of degree. But if in a given case the superiority and over-reaching was so great, equity would overrule the contract of the book salesman as any other.

I may say I can see what your Honour puts but we would put in each and every case it is a matter of degree. The classic case is where somebody is not very well equipped mentally, and it is much easier to imagine somebody being in a position of superiority, but to apply it to the facts of this case we say if A is inferior to B 50

this is the classic situation of superiority. The fact that a man is in fear of somebody else is itself a statement of superiority of an ultimate kind.

TAYLOR, A-J.A.: In a situation of superiority not a relationship?

MR. GRUZMAN: It depends how long the situation continues. A apprehend "relationship" implies some length of time. A becomes B's guardian today. I suppose the relationship exists immediately although the cases seem to speak and have regard to cases where it is continued over some time or someone becomes one's solicitor in one moment; the relationship is immediately there. If a situation of fear, dependency for one's life at the hands of another man exist, it may exist for a short time or a long time, but once it exists it exists, and if then you have a situation where A has superiority to B, according to Mr. Justice Fullagar, that is all that is needed.

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I say "superiority", I mean a relevant superiority in the sense in which it is used in the cases. That is all that is needed.

The second point is, and the cases more particularly speak of this, and his Honour Mr. Justice McTiernan certainly accepts this as the principle; that you look at the second point; Given the relationship has there been an unconscientious use made of it?

MASON, J.A.: I cannot help thinking you are confusing it by using this expression "superiority". If you look at the language in the cases that word is never used. The expression that is used is "position of disadvantage" or "serious disadvantage" and what I suggest to you is if you look closely at what it says it seems to contemplate an objective condition, certainly an objective condition which may be availed of by another person to his advantage but it is not a matter of using the word "superior" which directly connotes a comparison between the two parties.

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MR. GRUZMAN: With respect, we would not agree with your Honour on that.

MASON, J.A.: Perhaps you would not, but perhaps you might use the language that is used in the judgments.

MR. GRUZMAN: What we are seeking to do is to interpret the judgments. For example, one always speaks of these relationships. Whenever one sees them in the judgments they are spoken of in pairs, they do not speak only of the weak man, they speak of the weak man and somebody on the other side, or the attorney and the client. All the different relationships are always expressed in pairs, and from that we submit, amongst other things, you draw the inference that it takes two people to create

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either the situation or the relationship, and as I put before in argument, two equally weak people would not create either the situation or the relationship. That is why we import the concept of comparison.

Perhaps if one looks at the principles as his Honour Mr. Justice McTiernan looked at them at page 385: "In my opinion the facts alleged constitute fraud according to the criteria ... bargain".

MASON, J.A.: There is nothing in that sentence which supports the notion of superiority as a comparison. 10

MR. GRUZMAN: No, but there is over the page when his Honour comes to the final criticism. I am reading through the whole of his Honour's thoughts on the principles. It continues: "Lord Hardwick ... ignorance". I agree that expression agrees exactly with the concept your Honour Mr. Justice Mason puts. "The word surreptitious would imply the bargain was snatched ..." The concept seems to creep in of one side being weaker than the other. "Lord Hardwick ... extracted." Not one party, but both parties. "Weakness on one side ... advantage taken of that weakness." When one speaks of usury one is not speaking of witness vis a vis the world; that is a weakness between these parties. 20

MASON, J.A.: One is concerned, first of all, to identify weakness on one side. In taking advantage of that weakness which, of course, must always occur if you are dealing with the situation you are contemplating, it is described by the word "usury" on the other. "Usury" does no more than signify the character of the person who is taking the opportunity presented by the disadvantageous situation. 30

MR. GRUZMAN: I could argue with that for this reason, that one of the cases points out that these matters had been dealt with by the usury laws which obviously had their attack on the usurer. I think it is in the Earl of Janssen that they say, "With the repeal of the usury laws we have to look at them in equity". I think it is in that sense that it says "Weakness on one side, usury on the other". 40

It is between the two people that the situation is regarded and it is just as bad in the eye of equity for a usurer to use his nasty ways against an ordinary man as perhaps a less experienced money lender against a weak man. In our submission equity does not draw any difference. What equity looks to is the difference in the relative positions of the two parties before the Court and it does not matter whether one party is below normal, normal, or above normal, if the party with whom he is contracting has a superiority or advantage relative to him. Extortion would not hardly be needed if it was a person so weak. You only have to extort from people who know what they are doing. His Honour states: "There has always been ... advantage taken of that weakness on the other side". I agree 50

in that mere statement that would support the concept indicated by your Honour but that happens to be this case and the Judge's statement of it at this point of time. "Such a class of fraud charged here ... counterclaimed". His Honour then comes on to the general principles: "Lord Selbourne said in Aylesford v. Morris ... having met upon equal terms". That is the definitive statement; there is nothing suggested in that statement of principle, which has existed since 1897, and that is here being approved by the High Court in 1956, there is nothing said in that statement of principle, and we would submit on the very highest authority the only thing required to attract the principle is that the parties have not met upon equal terms. I do not mean by that, as his Honour Mr. Justice Jacobs said --- 10

MASON, J.A.: You fall back on the expression "serious disadvantage"; equity only takes notice of a serious disadvantage?

MR. GRUZMAN: Yes. We submit the effect of the authorities is quite to do away with any necessary concept that the party who is seeking to set aside the contract was below normal vis a vis the rest of the world. There is only one thing necessary, one thing to look at; what is his relationship with the man with whom he is making the deal. Is he less able against him to handle himself than he should be. It is enough, indeed, far more than enough, in our submission, if he fears for his life at the hands of the other man then he is less able than he should be. He has got, as one of the cases say, a halter around his neck. 20 30

JACOBS, J.A.: Just before you leave what you were putting to me earlier, would you give me one example of where a plaintiff must prove undue influence as a fact in relation to a particular transaction in line with the approach you are making; where he must prove undue influence as a fact in relation to the particular transaction which is impugned. If you could give me an example of how that principle operates I can then distinguish the area of its operation from such a case as the present one. I do not mean an outside authority; a hypothetical case will do. 40

MR. GRUZMAN: His Honour is looking for an example of a case where undue influence has to be proved as a fact?

JACOBS, J.A.: In relation to the particular transaction which is impugned.

MR. GRUZMAN: As his Honour Sir Owen Dixon said in Johnson v. Buttress, most times or even in the examples one could quote, when you seek to prove what your Honour suggests you also incidentally prove a relationship because the undue influence, the facts which occasion the undue influence are frequently the same facts which prove a relationship, and his Honour there says that that is the reason why there is confusion about it. I might read this passage to your Honour? 50

JACOBS, J.A.: I would most prefer to my own clarity of thought if you simply gave me a hypothetical example if you could, because at the moment I cannot think of one along the lines of your reasoning. It seems to me what you are now saying Sir Owen Dixon indicated as a common would be true in every case, that as soon as you proved a situation of overbearing you would immediately get the benefit of the presumption.

We have always been taught that is now the law; but if you are challenging that general concept then we have to be clear about it but we have been taught through the cases that there were the two categories, relationships which led to a presumption and cases where undue influence had to be proved as a fact. I want an example within your approach of the latter. 10

MR. GRUZMAN: I would like notice; but I understand what your Honour is putting. What happens is this: There is the traditional approach, some of the things we all learnt at law school, if I can so put it, where it was very convenient, and we were told duress can only consist of imprisonment or that type of physical restraint or threat of it. However, there has been produced an old case where duress consisted of restraint of property, which was quite foreign to our understanding of duress. 20

We understood undue influence fell into one category and so on but what has happened is that the law, in our submission, is in a state of flux and the situation narrows itself down to this: Equity will say, as I put before, it really only has to look at the one point of time when the two parties met together; is A in a relevant position of superiority to B and if so, presumption. 30

JACOBS, J.A.: You concede your submissions do in fact overthrow the conventional or traditional approach?

MR. GRUZMAN: That is a matter I would like to have notice of; but that is the way I put it at the moment. The reason why I put it so is that Bromley appears to say so. In Johnson v. Buttress on the other hand, which was in 1936, the Court drew a clear distinction in terms. I will come to that later. 40

May I finish with Bromley's case and then turn to Johnson v. Buttress? Before I submit too strongly to your Honour what I am putting involves over-ruling in the past, I would point out the principles adopted by Mr. Justice McTiernan which is some lines beyond the passage referred to by his Honour, and I invite your Honours to look at page 17 of your Honour's books. It is page 491 in the case of Aylesford v. Morris. It reads: "It is sufficient for the amplification of a principle ... over the weaker". That is all that is required. That is from the same authority which is accepted in 1956 in the High Court. That is an end to it. 50

JACOBS, J.A.: If you can take this out of context like that, yes, but not at the bottom of the page, "The victim comes to the snare ... but for prodigals generally as a class".

MR. GRUZMAN: This is a particular example. This is the application of a principle.

TAYLOR, A-J.A.: If you go over the page: "He comes in the dark and in fact without either the will or the power to take care of himself ... nobody else to take care of him".

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MR. GRUZMAN: That is the way the Court proved it.

TAYLOR, A-J.A.: His weakness is common to all who are prepared to take advantage of him.

JACOBS, J.A.: There is no difference in the law between a weak-willed moneylender and a strong-willed moneylender, assuming there was, on this principle, an individual differentiation.

MR. GRUZMAN: It might be reversed.

JACOBS, J.A.: If you reverse the roles the moneylender could cry in vain to the Equity Court for relief against a strong-willed heir.

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MR. GRUZMAN: There is only one point and that is in the particular transaction, which is the stronger party; has the stronger party domination over the weaker and I can imagine the case of a young man who inherits his father's usury business and is approached by Earl someone or other and is talked out of the family fortune.

JACOBS, J.A.: Because he is being looked at not as a moneylender but as an expectant heir?

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MR. GRUZMAN: No, he has put all in his pocket before the Earl came along. It is our submission the principle which attracts equity is not necessarily the labelling of the parties. The principle is as laid down whether the parties meet under such circumstances as in the particular transaction to give the stronger party domination over the weaker. In this particular case the Court having laid down the principle of Lord Selbourne, it then had to establish why it was that that principle applied to this case.

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His Lordship did not accept it as just from a statement of the facts, he had to examine the facts and then to say "Yes, because young fellows do tend to be extravagant and this particular young fellow was extravagant and because there are people who will try and rob them of their fortunes or their prospects, for these reasons, therefore, yes, this Court is satisfied that in this particular case the moneylender was stronger and therefore he had domination over this other fellow, who was weaker", and he looks at other principles and he said it was a fraud on the father.

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Those are particular arguments or reasons adopted by the Court as justifying the application of the principle to this case but the whole point of the cases is, and the point extracted by Mr. Justice McTiernan on the arguments put to him by Mr. Bowen; and they went through all the cases and they said, "Look, there is one principle to be extracted". This was the successful argument in the High Court. The successful arguments were: "The common features present in these cases are that the parties ... beneficial to the stronger".

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Indeed, Mr. Bowen, in this part of his argument never ever submitted his client was inferior to the rest of the world, he never put it. What he put was that he was inferior to Bromley and his agent; and he did so on the basis of 14 or so authorities which he analysed. After analysing a large number of authorities going back for many years, text books and so on, he extracted one common principle and that is accepted by the High Court, so in our submission, there is no authority for the proposition that the weaker party has to be in some way weaker than the rest of the world. There is simply no authority for it although in many cases it would happen, but the common factor is weakness relative to one another.

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TAYLOR, A-J.A.: That is the only weakness that is material. If a person is old and senile and stupid, he is old and senile and stupid qua the rest of the world, but the material thing is, is he old and senile and stupid qua the person who takes advantage of him?

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MR. GRUZMAN: The question is what was the operating principle? Was it the operating principle here was a man who was old and senile and stupid to the rest of the world, or was the operating principle what was he to this fellow?

TAYLOR, A-J.A.: He was old and senile and stupid "full stop".

MR. GRUZMAN: What fell from your Honour Mr. Justice Taylor was neither the argument nor the judgment, it was neither argument nor found in the High Court that that was the principle. The argument was that the parties met on unequal terms and advantage was taken of this by the stronger.

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TAYLOR, A-J.A.: They met on unequal terms because he was recovering from an alcoholic hangover, he did not know what was going on, and he is selling the property and the other man is buying.

MR. GRUZMAN: If that was the rule then his contract to take a taxi, or whatever he did, would be vitiated; or whatever he did. What we are examining is the position between the two contracting parties. We are not dealing with a new principle. The argument submitted was not new then. It was not new when White and Tudors Equity cases of 1897 was published.

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JACOBS, J.A.: The real point is, to go back to something my brother Mason drew attention to this morning, when you say when the parties met on unequal terms that means they are already on unequal terms before the particular transaction arises. The real point is whether exactly the same principle is applicable where they meet equally but one is overborne by the other in the particular transaction or whether it is alleged they are overborne by the other in the particular transaction. If these people were not in equal terms when this particular transaction arose then what you are saying is there was already a relationship between them of dominance, a general relationship of dominance. If you can establish that on your pleadings and on the evidence I would be the first to concede that it changes the onus, but what I am saying is if you have not got a prior relationship and you come to a particular transaction and, therefore, ex hypothesi they come to the particular transaction on equal terms, these principles are not applicable. You go then to the nature of behaviour in the particular transaction and that, as I understand it, is what my brother Mason was drawing your attention to this morning.

MR. GRUZMAN: I understand that. The problem as we see it is this: Take the moneylender case and do not call him an expectant heir. Take the moneylender case. Would it make any difference if he was in the toils of the moneylender for years before, as happens in some of the cases, or this was his first transaction?

JACOBS, J.A.: It makes no difference.

MR. GRUZMAN: It makes no difference. The statement is exactly accurate; it depends on how they met. Do they meet upon equal terms or not, and in a given case it does not matter whether there is a pre-existing relationship or not, so you can regard it from two ways. I suppose you could say a man who is short of money and who is contemplating a visit to a moneylender is, for that reason, in some position of inequality. I suppose you could.

JACOBS, J.A.: And young and improvident.

MR. GRUZMAN: They are sometimes a concomitant and sometimes not. The situation is, for whatever reason, he is in an inferior position. You can say he was in an inferior position the day before if he thought about it although he may only have lost his money at the races the day before, or he may lose it in the morning and go to the moneylender in the afternoon. In the morning he would not be in an inferior position; if he loses \$100,000 at the races and half an hour later goes to the moneylender. We submit the effect of that is this: The only relevant relationship for this argument is what was the position at the time they met. That is the only relevant relationship. It is sufficient if at the moment they met there was a relationship of superiority.

JACOBS, J.A.: A relationship?

MR. GRUZMAN: One can call it that.

JACOBS, J.A.: A particular relationship?

MR. GRUZMAN: If I may say so, we are not unduly troubled by labels, situation or relationship, if you like.

JACOBS, J.A.: A particular situation. I would concede if that exists you may well be right in saying a presumption on the particular transaction arises.

MR. GRUZMAN: And now all I do further is to say if a man is inferior to the proposed moneylender he is in no different position, he is doing that because he wants something from the moneylender and it depends on the moneylender if he can get it and he is beset by his worries and therefore he is half in his power already. 10

In our submission there is absolutely no difference between Barton, whose life is being threatened daily by Armstrong.

JACOBS, J.A.: A lot depends upon the meaning of "particular situation". I would recall to you the example you gave before lunch of the large threatening man who meets for the first time the puny man. In what I have been saying there is no situation existing between those persons at all, therefore what you put does not apply. If by what you are now putting you seek to allege that prior to this transaction Mr. Armstrong had reduced Mr. Barton by threats and dominance to a position of subservience where his will was gone, wholly or in part, then I would think there would be much to be said for the view you do not have to prove the particular transaction was vitiated by the overbearing of will, but that was not the point I was joining issue with you on this morning. I was joining issue on the sort of idea that at the very moment of dominance, of assertion of the dominance a relationship can arise which switches the onus. 20 30

MR. GRUZMAN: I did not complete my example very well. What I would have meant to say was --- 40

JACOBS, J.A.: A relationship or situation arises which can shift the onus.

MR. GRUZMAN: Assuming the facts were the big man and the puny man and it is also found the puny man is in fear of his life at the hands of the big man but they have never met before. Let us suppose he trembles to the extent a Judge says, "Yes, I think that man was in fear of his life at the time he signed the contract". Our submission would be without more equity would call on the big man to justify the contract. 50

JACOBS, J.A.: As a matter of law rather than as a shifting onus?

MR. GRUZMAN: A shifting onus arising from the presumption.

JACOBS, J.A.: A legal presumption, not an evidentiary presumption?

MR. GRUZMAN: A legal presumption. As Mr. Justice McTiernan said: "There is always fraud presumed or inferred parties contracting".

And then he sets out the relationship. The example I postulated of the big man and the little man who is found to be in fear of his life at the hands of the big man, the Court would infer from that a presumption of fraud and would then make the big man justify the contract. 10

"A fraud of this kind may be presumed from the circumstances and conduct of the ... unfair to the weaker side", Lord Hardwicke said. But in our submission there is no relevant difference, so far as presumption goes, between the relationship and the situation, and the situation being imagined to be one where the parties to the contract have not met upon equal terms. There is difference in proof, I suppose. It may be in many cases easier to prove a relationship than to prove a situation, for example, father and son. 20

JACOBS, J.A.: Are you referring to "pre-existing"?

MR. GRUZMAN: Yes. It may be in many cases much easier to prove a relevant relationship than to prove a situation in the sense in which we believe - where you can take the solicitor-and-client position. The relationship can easily be proved, but it may be impossible to prove that in the particular transaction one was superior to the other or otherwise. One can imagine many cases like that, and although we do not think that the solicitor, with all his knowledge, and the client without any, would be in such a situation we do know when one thinks about it that there are such cases where the situation is reversed. You could have a young solicitor with a very wealthy and experienced business man client. It may be impossible and indeed, it may not be the fact that in the situation they meet on unequal terms in the relevant sense. Or it might have been the reverse. These are matters of proof. 30 40

JACOBS, J.A.: If it is reversed and if you found that the young client has threatened the old solicitor, do you say from that threat a presumption arises that he influenced the old solicitor?

MR. GRUZMAN: Not from a threat per se. If the Court is satisfied that at the time these two parties sat down together the old solicitor was in fear of his life at the hands of this brash young client, then the Court would reverse the onus. 50

JACOBS, J.A.: At the time when they embarked on the negotiations?

MR. GRUZMAN: Possibly the same thing; but certainly

when they sat down together to sign the contract; if the fact was that the Court found the poor old solicitor was in fear of his life at the hands of this brutish young client, then things would be reversed.

JACOBS, J.A.: If you mean by that that the general situation of fear had arisen and the overbearing of the will of the solicitor had already taken place, I would agree with that.

MR. GRUZMAN: But there has been no case where it has been required to be shown that there has been an overbearing of the will, in any of these cases. That is presumed. 10

JACOBS, J.A.: General overbearing of the will was Johnson v. Buttress?

MR. GRUZMAN: That is one of the cases of proven relationship and as the Court said, it may have proved undue influence, but that does not alter the rule.

JACOBS, J.A.: I think we have thoroughly explored it now. It has certainly clarified my mind on this. 20

MR. GRUZMAN: At page 392 of Bromley v. Ryan his Honour says ... (read). What happened there was that first of all the Court found that the parties met under relatively unequal terms. Secondly, from that fact there was a presumption made that they took advantage of their relatively superior strength and made undue influence of it. That was a presumption of law. It was then for the defendant in effect to justify it on, in that case, I suppose, the plaintiff. 30

The discrepancy between the price and the value was very small. Although his Honour said it was large, the fact was that over a period of twelve months the defendant had been in some sort of way endeavouring to sell the property at the larger figure. So that the point to be taken from the case is that once you get the presumption it does not take much evidence to satisfy the Court or (putting it in another way) for the defendant to be enabled to satisfy the Court that the transaction was not righteous. And here the twenty or thirty per cent. difference in the price was regarded as significant. 40

MASON, J.A.: Do you concede that the interpretation you place upon Bromley v. Ryan is inconsistent with the judgment of Dixon, J. in Johnson v. Buttress?

MR. GRUZMAN: No, your Honours. It is a substantial example. Bromley v. Ryan is a different case to Johnson v. Buttress. 50

MASON, J.A.: I thought you were earlier foreshadowing a submission to the effect that Bromley v. Ryan overruled Johnson v. Buttress.

MR. GRUZMAN: No. This is a matter on which, I think, I sought time to consider more closely. I must say I can imagine that Johnson v. Buttress could have been more easily decided on the principle of Bromley v. Ryan. In other words, you could have decided Johnson v. Buttress by saying at the time they met did they meet when one was superior to the other? It might be the fact. That is, as I see it, and as I was putting to Mr. Justice Jacobs before; it is really a matter of proof. It might have been a lot easier in Johnson v. Buttress to prove the relationship or its incidence and so on, from which you would infer that when they met they met on unequal terms rather than setting out to prove that in the particular transaction there was inequality. That may be the real difference between the two cases and the two approaches. 10

I would like to look very briefly at the statement of Fullagar, J. at page 401. What his Honour said was, "The case is not one of that comparative rare class where a man's faculties ... he should be allowed to enforce it". You can summarise our submissions in this rather vernacular way: the Equity Court would not let Armstrong get away with the sort of conduct he engaged in here. 20

MASON, J.A.: That begs the question. What conduct? What did he do by influence?

MR. GRUZMAN: We submit your Honours will find this, he at least certainly sought to obtain this contract by threats and on 12th January he said so. In fact, five days before the contract is signed. We submit that is relevant, and that, having regard to all the circumstances, it would not be consistent with equality and good conscience that Armstrong should be allowed to enforce that contract. It would not be consistent with equity. 30

At page 405, halfway down the page, in the judgment of Fullagar, J., "One other general observation may be made before proceeding to the facts of the present case ... satisfactorily classified". 40

JACOBS, J.A.: I think you read this page on page 405 this morning.

MR. GRUZMAN: I do not know that I did. I would like to just read it on this one point and refer your Honours to it again particularly: "Among them are poverty, need of any kind" - and I do not put this as a basic submission but I suppose if there was a need to get rid of Armstrong that would be enough. Then it goes on: "Drunkenness, illiteracy, lack of education ... determined by the bargain". I do not say his Honour's view finds expression elsewhere, this is the view of Fullagar, J., "It does not appear ... in accepting the contract". 50

Although Kitto, J. dissented on the fact, at page 415 he quotes really the same principle of equity: "It applies whenever one party to a

transaction is at a special disadvantage in dealing with the other party because of various matters ... placed in his hands".

I would only point to this fact, that Kitto, J. in a judgment of eighteen pages examines the facts and examines the aspects of the evidence on which the trial Judge has made no finding and indeed his Honour has not referred to them. Then having done so his Honour then comes to his own findings on the facts which differ from those of the trial Judge in material aspects and on the results - on the facts. So you have the position that three judges of the High Court examine the situation and each of them examines the facts. McTiernan and Kitto, JJ. do so in very great detail and McTiernan, J. finds substantially similar facts to the trial Judge. Kitto, J. finds an entirely different set of facts from the evidence and draws entirely different inferences and gives an entirely different result on the facts. 10 20

If I might illustrate, McTiernan, J. puts it this way: he said it was sought to establish by circumstantial evidence that this man went to his accountant - but when the accountant was called he said he did not know anything about it or did not remember anything about it. Kitto, J. in his finding on the facts said that the solicitor rang the accountant and Ryan went to the accountant and came back from the accountant with a piece of paper in the accountant's handwriting which, among other things, mentioned the figure of £25,000. 30

There is also the way in which the judges deal with the evidence of the solicitor where it is shown that his evidence was completely at variance. Kitto, J. accepts the solicitor's evidence and McTiernan, J. says that he accepts it but he did not know what he was looking at. So when someone says that the man was affected and the solicitor says he was not, Kitto, J. said, "We could not see".

I only indicate that to show that it is entirely a matter for this Court, with its limitations, to find on the facts, on every aspect, which included in that case the ultimate question of undue influence. 40

The remaining cases in this volume we do not propose to refer your Honours to. They are put there so that your Honours could have a look at them if so disposed. They are cases on wills. There is a statement at page 119 which said in effect it does not matter - "What we are really talking about is the fact that this was a man's will or intention, but that is not the point; the point is how it was brought about". 50

Just in case your Honours would like a reference to the matter which the Chief Justice referred to in one case - "There is no possibility of mistaking midnight for noon ... becomes certain", that appears at page 46 of this case. His

Honour, the learned Chief Justice, used that remark with some devastation in a case in which I was involved.

In a will case while undue influence can be shown, it is a much heavier burden.

MASON, J.A.: There is no traditional relationship of influence?

MR. GRUZMAN: Except, of course, that the problem in a will case if one makes a contract with one's nephew that in itself may create a suspicion. If one leaves one's money to one's nephew, that is natural enough, and therefore one has problems arising from that.

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JACOBS, J.A.: If I may make the comment, it would be interesting to have a case where a beneficiary had said to the testator, "You make a will in my favour or I will kill you" and the will had been upheld by the Court.

MR. GRUZMAN: That is so, your Honour.

Towards the back of the book, and I am not going to go into this in detail, one might look at matters of fact starting at page 139 in Pothier on Obligations. For example, halfway down page 2 (page 140) "... of reward ... or extortion". What we say here is that part of the consideration was that Armstrong refrained from pursuing his threats and attempts.

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In Collins v. Blantern, this is a case of payment in respect of an implied proposition that there be no prosecution.

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I have mentioned how hard it is to find such a case. At page 149, "Where a man of full age ... derived from fraudulent consideration". The point of the quotation is that if a man is under the influence of terror he is not in a situation to be master of himself.

Lound v. Grimwade, is another of the cases where there was no agreement to abstain from prosecution. There were no criminal proceedings that in reality were ever contemplated - it was put - and his Honour found that criminal proceedings were not contemplated: "The bond of mortgage ... proceedings". Here you have a case where a man had done nothing wrong and nobody was going to prosecute him. At page 157 he just wanted to be out of it. The judge held "under those circumstances I am of the opinion that the consideration was partly legal", remembering that the only effect of this prosecution "thought" dealt with the illegality in the same way as you deal with illegal threats. "Under those circumstances I am of opinion that the consideration was partly illegal". At page 613: "As part of the consideration is illegal it follows that the whole is bad".

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In Earl of Chesterfield v. Janssen, which is an old authority and almost treated as the basic authority on these cases - I understand that Winston Churchill's ancestor was one of the plaintiffs - at page 170, (28 E.R.): "The second question is ... certain cases". In other words, the very transaction in this case is enough to attract the principle". A third kind of fraud ... party to the fraudulent agreement". But here we are dealing with the effect of fraud, as we put it, on Landmark. "It may sound odd ... who have divided the spoil beforehand". 10

There are a few more cases. I would like to hand up to your Honours a translated copy of this German case.

MASON, J.A.: No South American cases?

MR. GRUZMAN: No, your Honour, but we can produce French, Italian and Polish. It is the fact, as I have indicated before, that we have tried to research the whole world literally. 20

MASON, J.A.: How can that really help us if we apply the common law and equity in this Court?

MR. GRUZMAN: We do not know how other systems of law may have regarded this particular problem and if there has been a firm trend in civil law we might have invited your Honours' attention to it. It turns out the strongest trend in law as to the greatest protection to the right of contract is in the common law, in equity, in British law and indeed, the strongest of all in Australia. I might mention to your Honours that Storey, 2nd Edition, at page 149, says, "The doctrine of the common law ... the party contracted". Mr. Priestley was kind enough to mention that. 30

The relevance of this case to these proceedings is this: what we were looking for was authority to cover the situation. Supposing we are unable in the end to persuade your Honours that Armstrong was responsible for Vojinovic and supposing your Honours felt that that was a major cause of fear. The question is: What does the law do about that sort of situation where in effect there is duress or pressure applied by a third party. Let us assume it happens when it is not even known to the contracting party. There is a series of cases on it. For example, the first one that comes to mind - which might seem quite apposite at the moment - is the case of the blind man who executes a deed, believing it to be something else, or having had it wrongly read out to him, but the other contracting party does not know anything about it. So that one contracting party is entirely innocent. One would ask oneself what does the law do about that? A man buys a house, for example, in good faith and then it turns out that there is some factor of which he had no knowledge and no reason to suppose and the man who read out the deed to a blind man in his own solicitor's office without the 40 50

purchaser being present, but read it out wrongly - the law has said there is no contract.

TAYLOR, A-J.A.: The deed is not his deed.

MR. GRUZMAN: The deed is not his deed. But then we come to the next point. What if A threatens B to sign to C and C knows nothing about it? What does the law say about that? In Sheppards Touchstone, which appears in Law I, page 382 it is said that if one threatened another to kill or maim him if he would not seal the deed to the stranger and thereupon he does so, this is void as if it were to the party himself. In other words, if Vojinovic's appearance was a matter which influenced Barton to sign the deed and Armstrong knew nothing about it, the law is that Barton can set the deed aside. 10

We endeavoured also to find other cases along the line where a man is subject to terror but you cannot sheet it home to the person concerned.

TAYLOR, A-J.A.: You seem to have got the benefit of the finding by his Honour that he took into account the alarm and terror raised in Barton's mind by Vojinovic even though he was not prepared to find that Armstrong was responsible for what Vojinovic did. You got the benefit of that. If you took the effect of Vojinovic on Barton's mind out of it, a great deal of the terror would go. 20

MR. GRUZMAN: Some.

TAYLOR, A-J.A.: A great deal.

MR. GRUZMAN: We then were looking around to find what authority there was for a situation where there was in fact a reign of terror, for which one could not establish that the plaintiff or the defendant was not responsible, and the only one we really found was the German case which was during the Nazi regime. 30

TAYLOR, A-J.A.: The case was decided by a Court which sat in the British zone of occupation in 1949.

MR. GRUZMAN: Yes, but the events occurred about 1941 during the Nazi regime. Following the collapse of the Nazi regime (page 3) the plaintiff contested the validity of the settlement as he had been induced to consider settlement by unlawful threats by the District Party Leader who had nothing to do with the other party. The Court held "It is of no relevance ... district party leader and Gestapo leaders". Then on the next page, "In his letter dated ... particularly the notice of termination issued by the defendant". In the first paragraph of page 6: "His alleged voluntary retirement ... ordinary course of things". 40 50

JACOBS, J.A.: Has the German law got the defence of purchase for value of a legal estate when induced? If it has not, how can it assist when we

are dealing with equitable rights and dealing with the possibility that persons have purchased without notice?

MR. GRUZMAN: First of all, in one of the authorities I cited the transaction was brought forward twenty-five years later and yet the equitable principles applied.

JACOBS, J.A.: Your hypothesis on this part of your argument is that Mr. Armstrong had no notice of the wrongful activity?

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MR. GRUZMAN: That is the hypothesis.

JACOBS, J.A.: So he purchased a legal estate in the shares, which made the transaction voidable in equity?

MR. GRUZMAN: The first problem is like that of the blind man ---

JACOBS, J.A.: That is illegal; that is law. Equity did not come into it.

MR. GRUZMAN: Yes, although I am not sure there are not variations of that.

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JACOBS, J.A.: There may be equitable problems, but as to no contract being void because only Equity can set it aside ---

MR. GRUZMAN: The first proposition was the blind man, and the second is when you go right back to Pothier, the propositions in Pothier seem to have been accepted.

JACOBS, J.A.: I just mention it, and I would be grateful if you would let us know whether they have principles of equity there, on these German authorities, or whether or not they have the defence of purchase to value of an illegal state - if you feel it is worth pursuing.

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MR. GRUZMAN: I may say, having had something to do with the law of a number of countries, that the similarity between the laws of the South American countries, the European States, the United States and here is remarkable and, indeed, I would be shocked if it was not.

JACOBS, J.A.: I would be surprised if they recognised Equity as a separate branch of the law. It would depend on the nature of the English law.

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TAYLOR, A-J.A.: You are only using this as an example?

MR. GRUZMAN: Yes. It is not a very good authority for this Court.

JACOBS, J.A.: I do not think it is worth taking your time on. We cannot use it as any more than a fact that other countries have similar problems

and deal with them in their own way, all pointing to what might be called principles of justice. It is not very surprising except to those who look on the law as a blind process of deduction.

MR. GRUZMAN: Which it is not. The law is wonderful. It usually has a proper solution to problems but sometimes it is harder to find than others.

We thought when we went to consider this aspect in the light of his Honour's judgment that one would find the lawbooks full of cases. For example, in the United States where the local Mafia leader has only got to ask someone to sell him his house at half-price - there would be that type of case, where someone is under terror, and there is the unspoken threat. But you cannot find one in the books. The amazing thing is that in our research we consulted professors of law over there and there is not one in the books. Probably the reason is that the fellow gets shot or goes to the police.

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There was one case where a man wanted a settlement of a Court case and rushed into the office of the president of the company and put a knife at his throat and made him bring out his solicitor, but that case did not help very much and we did not bring it over. But it is amazing that this is a situation which this Court has to decide and we have researched the whole world and are unable to bring to your Honours' notice a set of facts which is parallel either in any system of law or in any other country.

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JACOBS, J.A.: I still say I find it interesting that a problem of duress should have been dealt with in this way in Germany but personally I do not find it helpful for the particular point you argue; whether or not a transaction which appears valid on the face of it to the other contracting party but which has the vice in it of an equitable defect can ever fail once the other person gets legal title. It could be so novel in the concept of equity it would be very difficult to accept.

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(Further hearing adjourned until 10.15 a.m.
Wednesday, 10th March, 1971.)

IN THE SUPREME COURT)
OF NEW SOUTH WALES)
COURT OF APPEAL)

Term No. 22 of 1969

CORAM: JACOBS, J.A.
MASON, J.A.
TAYLOR, A-J.A.

BARTON v. ARMSTRONG & ORS.

FOURTEENTH DAY: WEDNESDAY, 10TH MARCH, 1971.

JACOBS, J.A.: Yes, Mr. Gruzman.

MR. GRUZMAN: May I say to your Honour, Mr. Justice Jacobs, your Honour's question yesterday was, if I may so put it, stimulating in that it has caused us to consider exactly what your Honour meant by it and to realise your Honour asked that question with a view of the law in mind. 10

Before I answer it may I say this: In our submission there does not seem to be a real answer to the question. I would like to illustrate that in this way. Your Honour's question was to suggest a set of circumstances where equity will require positive proof of the exercise of undue influence, that being a category of cases which has been recognised in the text books of equity for years. 20

I could name, for example, the engaged couple or I could name the married couple, and when one goes into it one finds that the law is in a state of turmoil. In the case of the married couple, for example, notwithstanding the closeness of the relationship and the obvious likelihood, perhaps that greatest likelihood of all, that one would be influenced by the other, the law for some reason or other does not recognise that as a relation of influence. On the other hand, in the case of an engaged couple where the opportunity for influence and the likelihood of influence must be far less, the law does recognise that as a relation of influence, although when I say the law recognises it I think that is probably the correct submission, but in a case to which I will refer your Honours in a moment, as late as 1961 in the Court of Appeal in England two of the learned law lords thought that was a relation of influence per se and one of them said it was not. 30 40

One can take it further. There was a case, and I will not take your Honours to it in detail, where two people were living together, the wife believing that she was married. If, in fact, she had been married the law would not have recognised the presumption. The question is what would the law do where she believed she was married? If they had been engaged and living together the law would have recognised the presumption automatically. If they had been married and living together; no 50

presumption. What was to be the position where they were living together and she thought she was married but she was not? The law said in this case they would recognise the presumption.

I notice your Honour Mr. Justice Jacobs looking at Sir Frederick Jordan's volume, which we have also looked at. This is a book most of us have looked at at some time or another with some degree of care and it, doubtless, represents the basic views of many of us on the law and it, of course, sets it out exactly as I would submit it to your Honour. In other words, undue influence is presumed in the case of special relationships and certain other relationships. At page 139 his Honour deals with the cases where undue influence must be proved as a fact. But if one looks at the cases cited by his Honour as authority for it they are all cases which are more readily acceptable under the category of other relationships where undue influence is presumed on proof of the relationship.

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What really follows from your Honour's question is that it has pointed to the fact this concept of relationships of influence is wide enough to encompass almost every case.

JACOBS, J.A.: Yes, but they are all antecedent relationships. This is the point, and do not overlook the fact I am quite aware of your submission that there was an antecedent relationship here. I am not dealing with that. I am pointing to the mere duress or undue influence on this particular transaction.

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MR. GRUZMAN: I think I apprehend what your Honour is putting. Accepting that for the moment as a starting point, what follows from it? Our submission is one has to look at what is the basic equitable concept behind these relationships. We have got such a multifarious number of relationships now.

JACOBS, J.A.: My view is, although I cannot be accepted as the law, this elevation of the distinction between a presumption of law and an evidentiary presumption of fact into two different categories is the fundamental cause of the difficulty but all of these relationships are really cases where it has become so apparent that a certain set of facts should lead to a presumption, but it has been elevated into a principle of law, therefore it is said the principle of law, the legal onus of proof changes.

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In other situations a set of facts may give rise to an equally strong presumption, leaving aside whether it is a presumption of law or fact, because it has not been categorised it has not got that aura of the presumption of law. It means merely an evidentiary presumption. Therefore, if a man threatens another man with a gun and says, "Sign this contract, or else", this is not limited to this branch of the law, it runs through various branches. It runs through various aspects of the

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law of torts. You will see it in Watson v. Drake in the High Court as the difference in presumption that damage flows. Whether the onus changes to the defendant to show that a condition of injury has come to an end or has been superseded by some other injury, the question arose, and fine distinctions have been drawn, as to whether it was a change of the legal onus. I respectfully suggest this dichotomy although it is well-established is a cause of a lot of the difficulty in thinking on the subject and really they both had their origin in the common-sense of the human mind without any real distinction other than that one is long accepted and the other is perhaps not so long accepted. 10

MR. GRUZMAN: Our submission is one can reconcile the views and reconcile the cases with a matter such as this by going back to first principles, by asking oneself, "What is the principle of which all these different cases are examples?" To do that you simply go back to the early cases. 20

I submit you really have got to go back to first principles and see what is the basic underlying principle and see whether that principle has application to this case. You cannot just look at the examples because the course have not done that at any time, except by way of some assistance but on the great cases that have been cited to your Honours, what they said in each case is, "We have never heard of a case like this before but let us have a look at the principle and see does the principle comprehend the particular facts of this case". 30

One of the basic principles is in Huquenin v. Baseley at page 32 of Law II and it says:

"The relief stands upon a general principle applying to all the variety of relations in which dominion may be exercised by one person over another."

It is that principle, in all its various guises, which attracts equity. If you have any sort of relationship in which dominion may be exercised by one person over another that is all that is required. Traditionally one knows the threats of death cases, being so obvious, seem to have fallen on one side and the far less of those cases have fallen on another side. 40

As I indicated with the engagement case, one does not know these days; the categories have changed and have merged.

I would like to illustrate that, if I may, by having a look at the 8th Edition of Hanbury and the 9th Edition of Hanbury? 50

JACOBS, J.A.: You say there is no need for an antecedent relationship for there to be a relationship of influence? Is this your primary point?

MR. GRUZMAN: No. We put the case on two bases. We say, first of all, it is a recognised head of equity that there is an antecedent relationship, and at the moment what we are about is to seek to establish to your Honours such a relationship existed here. Secondly, we say there is another head. It may be part of the first one or it may not; it is characterised differently, and that is when the parties actually meet, is one superior to the other? We also put the case on that basis, but I will deal with that later. For the moment there is no doubt on the authorities that if there is an antecedent relationship of a relevant kind, that that would be sufficient to alter the onus.

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JACOBS, J.A.: And one that is relevant is domination by fear and terror?

MR. GRUZMAN: Yes.

JACOBS, J.A.: Speaking for myself, you do not have to convince me of that. If there was an antecedent situation of domination by fear, an antecedent relationship of terrorisation, and if that is open to you to raise you would not have to convince me as a matter of law that it would bring the presumption of undue influence.

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MR. GRUZMAN: If that is the view of each of your Honours?

JACOBS, J.A.: It would have to be enunciated to the extent to which it affected the freedom of choice, but I was putting forward the hypothesis of a general situation, antecedent situation, of one person terrorising another generally.

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MR. GRUZMAN: That is the way we put the case. If I may take it that each of your Honours ---

JACOBS, J.A.: You cannot take it that way.

MR. GRUZMAN: Certainly that is our submission.

JACOBS, J.A.: I see no difficulty in that. You have not pleaded it, but that is another point.

MR. GRUZMAN: That has been cured, or we hope it has.

JACOBS, J.A.: Yesterday you were dealing with a case where there was no antecedent situation.

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MR. GRUZMAN: May I make my submissions clear this morning, and they have been indeed clarified by your Honour's question. For the moment our submission is this: first of all, we seek to show if there is an antecedent relationship of terror that such a relationship will, according to equitable principles, reverse the onus of proof.

JACOBS, J.A.: Terror with consequential domination?

MR. GRUZMAN: Terror leading to domination. That

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is the first point we seek to establish. That is a submission of law. We establish that in this way; we submit you have got to go back to first principles and see whether the general equitable principle of which all the cases are examples, comprehends that situation and that is why I read the basic principle as set down in Huquenin v. Baseley that is referred to in practically every authority of note up to the present time, which says:

"Relief stands upon a general principle applying to all the variety of relations in which domination may be exercised by one person over another." 10

It may be sufficient for me simply to say in terms no one would have any doubt that if one person is in fear of his life at the hands of another that that is an obvious and paramount situation in which it might be said domination may be exercised by that person.

MASON, J.A.: I understand this major proposition, but can you tell me as at what time you apply it to the facts of this case? What is the date at which you say this antecedent provision of dependence existed? 20

MR. GRUZMAN: Our submission would be because it is a relationship, therefore it will have a beginning, and a middle, and possibly an end.

MASON, J.A.: Will you tell me what it was?

MR. GRUZMAN: The relationship of terror, on the evidence, commenced on the 17th. 30

MASON, J.A.: I am more concerned about the end product, that is dependency, domination, whatever you like to call it.

TAYLOR, A-J.A.: When did he obtain domination over his mind?

MR. GRUZMAN: Before answering your Honour, if your Honour would permit me, may I make these submissions? We are in a realm of fact. We are in a realm of the consideration of the effect of one man's mind of the actions of another man. We are in a realm of considering, in a word, the interaction between two men. To understand that one has to delve; you cannot regard it as a conveyancing problem, and I am not suggesting one does. 40

MASON, J.A.: My question was of chronology, not of conveyancing.

MR. GRUZMAN: I understand your Honour's question, but you cannot name a time, generally speaking, in the development of a human relationship. Indeed, may I adopt the example which appeared in the case yesterday, and the one which Sir Leslie Herron adopted, that one does not know when day ends and night begins. One knows very well what is midday 50

and midnight, so it is perfectly clear at one stage Barton was in a position where he could fight back against Armstrong and at another stage he was in a position where he was submitting to anything Armstrong wanted.

TAYLOR, A-J.A.: That could be very unfortunate for your case because you cannot fix a time, and if we are to accept the view the agreement was made on 4th January, it occurred then, and this terror did not obtain domination over his mind and into a degenerative incident, you would fail. 10

MR. GRUZMAN: There are several answers, if I may say so, to that proposition.

TAYLOR, A-J.A.: I was only accepting your proposition that you cannot put a time to it. It is still twilight and not dark; on 4th January.

MR. GRUZMAN: The first point, on our submission, is that there was no contract in any sense at all. The fact that Barton, who was then certainly being terrorised, if not dominated for the purposes of this argument, and I only say perhaps for the sake of this argument, if that was the position on 4th January and he then temporised and said "Yes, I will agree to anything" --- 20

TAYLOR, A-J.A.: You are not answering what I put to you because what I put to you pre-supposes if we accept it was made on 4th January, and I want to know what the position is if the agreement was made on 4th January. I am not saying it was, but it is a view that is open. How does that fit in with your proposition that you cannot fix a point of time at which the terror which was affecting this man's mind so affected it that Armstrong obtained domination over his mind, that is he was no longer capable of acting as a free person? 30

MR. GRUZMAN: If one had to fix a time, and we submit you do not, but if you had to fix a time I would say the domination was at some time anterior to 14th December. To understand that submission it is necessary to understand that domination can go up and down; it is a fluctuating matter. It is not a case of suddenly the axe falls and thereafter one man in every respect and at every time is under the domination of another. 40

MASON, J.A.: Running into another difficulty, you can see sometimes it is domination and sometimes it is not. How can there be a presumption at any stage that there was domination which induced entry into a subsequent contract. If that is the state of affairs as disclosed by the evidence are not you then fairly and squarely in the position of having to prove domination, and domination that resulted in the making of the contract? 50

MR. GRUZMAN: No. The principle laid down nearly two-hundred years ago is if there was a relationship in which domination may be exercised, and that

is why I have stressed that in all the cases they have said it is because you do not know. In one of the cases they say a person who interferes in such a transaction takes upon himself the whole proof. That is the principle. Throughout the case I have indicated the trend that because you do not know, was it the result of influence or not, therefore the onus changes. Indeed, there are authorities to show even if we are satisfied ---

JACOBS, J.A.: I am not going to carry on with this because may be it is profitless, but there is a world of difference between a situation where domination exists and the question is whether or not it was an operative factor at the time of a particular transaction and a situation where domination itself is fluctuating. 10

MR. GRUZMAN: With respect, we would put, if we may, that is only applying labels or putting words to it.

JACOBS, J.A.: If that is all it is we need not worry. 20

MR. GRUZMAN: The question is what was the human relationship. Strangely enough the earliest principles seem to speak the loudest and the clearest. Is there a relationship in which domination may be exercised so the only question really for this Court at this stage is was there such a relationship that within that relationship dominion might be exercised. Once that conclusion is reached the relationship, of course, is continuous and it is the relationship which is the matter that the Court is concerned with. 30

As I understand it your Honours have put to me the question, is not only the relationship but, as it was said, the end product, the domination. We suggest the relationship started and had its origins back in May or some time earlier in 1966. The relationship between these two men was a gradual process, it was a true relationship, if ever there was one.

MASON, J.A.: True relationship of what? 40

MR. GRUZMAN: Of Armstrong in a situation vis a vis Barton where Barton knew that he was, to put it broadly, a dangerous man.

MASON, J.A.: You are not suggesting a relationship of dependence existed in November 1966, or of domination?

MR. GRUZMAN: We are suggesting a relationship of fear.

MASON, J.A.: I am talking about domination and dependence which is the relevant relationship on the submission you are making. 50

MR. GRUZMAN: With respect, may I adopt the terminology of his Honour, Mr. Justice Jacobs, namely

to deal with the relationship on the one hand and the end product of the relationship ---

JACOBS, J.A.: It may well be accurate, but it was not mine.

MR. GRUZMAN: This is what I wish to argue this morning: I wish to put to your Honours that this relationship - and it was a relationship - was of gradual development but the end product, the domination; just when domination arose is not so easy to establish, but we would submit that was domination at some time before 14th December. 10

TAYLOR, A-J.A.: Is it a finding of fact?

MR. GRUZMAN: Yes, it is a finding of fact. One's starting point must be the original principle and the original principle was, for this purpose, in the variety of relationship or the variety of relations in which domination may be exercised, and these words are familiar to your Honours, they say:

"this case discovers one of a very peculiar nature", 20

and your Honours have read similar words in every case. In that case it was influence obtained through the sacred character of a Minister of religion. In Buttress' Case it was something else, kindness to an old man. What is the common characteristic? For example, in Buttress' case the High Court did not say just because the man came and had lunch with you you cannot take any notice of that. What the High Court did was to look at each and every fact; he came and had lunch, he discussed things with them, and so on. Every relationship must have a starting point, a waxing of the relationship and eventually the court is looking ultimately to say, is that the sort of relationship that might produce the relevant end product. 30

MASON, J.A.: Could we just get a little more precision about your submission? You say a situation of domination over the plaintiff's mind existed prior to 14th December?

MR. GRUZMAN: If one has to put it like that, yes. 40

MASON, J.A.: One has to if we are dealing with a submission from you that an antecedent relationship existed. It is necessary, as it were, to confine it and crystallise it with some precision. You say before 14th December. How long before 14th December? Did it exist at the time of Mr. Armstrong's removal as chairman of directors at the instigation and behest of the plaintiff?

MR. GRUZMAN: In the realm of the human mind you cannot answer these matters. So far as actual domination, my answer would be probably not, and we would invite your Honours to say probably not on that date and that is the way in which we would invite your Honours to find; probably not, because 50

you are dealing here with interaction. What is domination? What is relationship? These two men undoubtedly were in a relationship. If they were in no other relationship they were in a relationship of co-officers of a company, they were in the relationship of people who saw each other every day, they were in a relationship where Barton regarded Armstrong as an evil man. That was all part of their relationship. All people stand in a relationship. Counsel stand in a relationship to the court. A driver stands in a relationship to his passenger in a car; everyone stands in a relationship. 10

The question then for the court is was this the sort of relationship which might give rise to domination. That is why I put it that you have got to start somewhere. Probably the true answer to "When did the relationship start?" is it started in 1963, that is when they first met.

TAYLOR, A-J.A.: Why did you introduce the word "might"? The classic statement leaves out that word if you look at what Mr. Justice Dixon said in Johnson v. Buttress: "That gives", and if you introduce the word "might", it means you have to go beyond the relationship and find whether in fact there was an authority or influence. 20

MR. GRUZMAN: I was reading from the authority of Huquenin v. Baseley there, which I think it is true to say that all of these concepts stand.

TAYLOR, A-J.A.: You quote from it?

MR. GRUZMAN: Yes. The word "may", I translated it as "might". The question is, is there such a relationship that within that relationship domination may or might be exercised by A over B. Once you have got the relationship that is all you need. If it is that type of relationship within which domination might be exercised, that is enough. If you had to prove domination was exercised, what is the need of presumption? All these cases rest upon the relationship. 30

TAYLOR, A-J.A.: You have got to prove that relationship is one of authority or influence. 40

MR. GRUZMAN: You have got to prove it is such a relationship as might give rise to authority.

TAYLOR, A-J.A.: Or influence.

MR. GRUZMAN: Yes. Take the classic case. For example, take attorney and client. All we know is that there is a relationship. It is possible within that relationship there could be domination. Who is to say there was. It does not matter; the court is not concerned with that. The question is, is it the sort of relationship within which domination might exist. Doctor and patient; you name any relationship. Father and son. These days if one thought about it the son might be more likely to exercise domination in that sense over the 50

father, but the court is not concerned with that. The court is concerned to know is there between these parties such a relationship that within that relationship domination might exist. It is that relationship and not the fact that in a particular case domination has been exercised that attracts the equitable doctrine, it is the relationship.

TAYLOR, A-J.A.: The evil thing is domination is exercised of a person, which is something that is not of his own free will. Unless that is established either by evidence or by something that is presumed no court interferes, as I understand it. You do not interfere merely because it is a relationship, merely because it is a transaction. The transaction must be brought about or affected by the relationship. That may be presumed in some cases and in cases where it is not presumed. Surely it must be established, 10

MR. GRUZMAN: That is the whole point. The point is, and indeed it followed from the question asked by his Honour, Mr. Justice Jacobs, that in all of these cases if you prove the relationship and the relationship is one within which there might be domination, that is all the court needs to put it into action. 20

TAYLOR, A-J.A.: Then you have a presumption. The thing you are seeking to set aside or attack was done because of the relationship and that is a relationship that gives influence but if you do not have a presumption you have to prove it. 30

MR. GRUZMAN: What I am putting is this: what was the relationship here? I am trying to apply the authorities to these facts.

TAYLOR, A-J.A.: I would have thought as at 22nd December, when you are looking at the minutes of the meeting of that date, the most undominated person there was Mr. Barton. You might also say he was extroverted on that day.

MR. GRUZMAN: If I may so put it, that is not an unreasonable comment on the evidence, but is that an end to the matter? 40

TAYLOR, A-J.A.: Of course it is not, but it indicates to me it did not exist at that time, right up to that time also.

MR. GRUZMAN: It may have existed before and it may have existed after.

JACOBS, J.A.: But we do not know about every day, and perhaps I am anticipating but if you want to prove a relationship of domination it would be a matter of investigating for every day in every aspect of their lives between each other. 50

MR. GRUZMAN: That is where equity comes in. Equity says that because the relationship is such you as the benefitor have to prove, you have got to prove

this transaction was not brought about by this relationship.

JACOBS, J.A.: To prove the relationship you would need an exhaustive examination of their personal relationship not only in relation to any particular transaction but in relation to everything.

MR. GRUZMAN: That is exactly what the courts have done in all these cases.

JACOBS, J.A.: If they had the opportunity.

MR. GRUZMAN: It has been the object to product the evidence to the courts and then they have gone through the evidence to see what was the relationship. As Lord Justice Lindley said in Allcard v. Skinner, at page 61 of Law I: "The influence of one mind over another is very subtle ... actual exercise of such influence". 10

Might I invite your Honour, Mr. Justice Taylor, to that. Lord Justice Lindley says this because there are people in a position to exercise undue influence although there has been no proof of the exercise of such influence, and the courts have done this on the avowed ground of the necessity of going to this length in order to protect persons from the exercise of such influence under circumstances which render proof of it impossible. It states: "The courts have required proof of its non-exercise and failing that proof have set aside". 20

One is only concerned with one thing at this moment, on our submissions, and one thing only: did there exist between Barton and Armstrong at any relevant time a relationship such that the court will think that possibly from time to time Armstrong could dominate Barton? 30

TAYLOR, A-J.A.: If I accept that then the position is that before Mr. Justice Street it was on the defendant to show that the agreement of 17th January was not entered into by Barton otherwise than with a free mind?

MR. GRUZMAN: Yes, that is our submission.

TAYLOR, A-J.A.: That issue has never been fought. 40

MR. GRUZMAN: It is being fought before your Honours. We will be making submissions on that. We are going to apply for amendments. Your Honours are going to deal with that matter, and I will show the authorities and if your Honours do not think there is evidence before the court now on which to determine that matter fairly to both parties then you won't grant the amendments.

TAYLOR, A-J.A.: What about the evidence that might have been called? 50

MR. GRUZMAN: Your Honours will consider that and if you come to the conclusion ---

TAYLOR, A-J.A.: You say this will arise at a later stage?

MR. GRUZMAN: Yes. I ask your Honours to listen, as it were, to our submissions at this stage upon the basis that they can be validly made. Subsequently it will be in your Honours' hands to say whether or not those submissions are properly before your Honours.

We have got to this point, that all we have to show your Honours at this point of time is that the relationship between Barton and Armstrong was such that the court would say that within that relationship it might be inferred that from time to time Armstrong could dominate Barton so there is a possibility - a reasonable possibility, I suppose - that at the relevant time when Barton entered into this contract he may have done so under the domination of Armstrong. That is all we have got to show for this purpose.

The only reason we have any difficulty in showing that is that this is not a traditional relationship. If it was a relationship, for example, as attorney and client then your Honours would say, "Of course, everybody knows attorneys can influence their clients into giving gifts" and so on if it was guardian and ward, or doctor and patient, you would say, "Of course, everybody knows doctors can influence patients into signing contracts or paying extraordinarily large bills", or if it was a spiritualist or a clergyman of some kind you would say, "Of course, we know they can get people to give gifts to their charities".

If someone was in a religious house, as in Allcard v. Skinner, you would say, "Of course, we know those sort of things can happen there", or on the other side you would say "Yes, of course, we know if somebody is very kind to a man who is an old man, we all know the old man will look with kindness to friends who are good to him and are likely to give them his property". All of those are just a few of the hundreds of examples of the application of the basic rule, the basic rule being: Is it a relationship in which domination might be exercised?

Here, first of all, his Honour found there was a fight between them, he found their relationship had started in a fight. Then he found a most extraordinary thing had occurred, that Armstrong had threatened Barton and he found that Armstrong had threatened Barton about signing this agreement and he found not only were there the threats by Armstrong but he found that Barton was in a state of fear and terror and mental torment and that Barton attributed all of that to Armstrong.

There is only one question for your Honours and that is this: is that the sort of situation or relationship in which it might be said that at some time Armstrong might dominate Barton? It does

not take more than the mere saying of it, in our submission, but it is a human relationship. The only reason it has not appeared in this category before is that it has not arisen in this way before.

To understand it one has to just look at the human side of it, and that is one of the reasons why I invite your Honours' attention to this book, "Battle for the Mind". It is important to know what effect fear has on a person. His Honour, Mr. Justice Taylor, said early in the case - and I appreciate his comment - that fear is more likely to make you hit back. 10

TAYLOR, A-J.A.: Some people.

MR. GRUZMAN: I appreciate your Honour's comment and I understand it, but we submit fear is likely to have other effects.

JACOBS, J.A.: There are two different uses you are making of this dominance. You are making use of it by saying it is not necessary to prove dominance at the particular moment. That is quite true, when you have a relationship, and when you talk about a relationship of dominance, you may get that from a number of different circumstances. You have referred to the traditional ones, but you may get it also, and I would concede myself as I said earlier, that you may get it from a consistent terrorisation and you prove the dominance or likelihood of dominance from the consistent terrorisation which on the evidence destroyed the will of the person generally vis a vis that person, then you may not have to prove the dominance at the moment of a particular transaction but to say you can take an intermittent approach to the terrorisation and its effect generally, is to me to transfer the concept of dominance from one area to another simply because actual dominance through threats is the basis of the relationship which you ask us to infer. 20 30

It seems to me there is a confusion there between two aspects; and that is what is leading to you being able to submit the actual relationship can be intermittent. 40

MR. GRUZMAN: With respect, I did not submit, I do not think, that the relationship would be intermittent.

JACOBS, J.A.: You did, in effect.

MR. GRUZMAN: I did not mean to.

JACOBS, J.A.: You said the condition of fear might be intermittent.

MR. GRUZMAN: What I actually put, if I recollect it, was that the relationship was continuous, that the manifestation of the domination may have been intermittent. Indeed, the domination itself may have been intermittent. 50

JACOBS, J.A.: You take, for instance, the meeting on 22nd December. If that showed Mr. Barton as a terrorised man fighting back you might be able to say there is a sign of the relationship of terror that was existing even though he was then exerting a will to the contrary, but to say that the terrorisation can be intermittent is to say the relationship can be intermittent, and that is your difficulty. In other words, it is just as though it is a solicitor/client relationship; while it exists there is a relationship of influence but it may be an intermittent relationship. You have got to prove that he was the solicitor of the client at the relevant time and you have to prove that at the relevant time a relationship existed. 10

MR. GRUZMAN: In making that statement what your Honour is doing is to apply what I would term a psychological judgment. Your Honour will pardon me. I think I understand what your Honour has said but I would submit this is the way your Honour's reasoning goes and if I may say, it is this very reasoning with which I wish, respectfully, to join issue. 20
What your Honour has said is this - put into other words - I understand the human mind. The human mind is such that if it is under a relationship of terror, and that is a relevant relationship, then there will never be a case where a man will stand up and fight in this way without betraying the terror.

JACOBS, J.A.: I thought I said just the opposite. I said on 22nd December it is conceivable you could put that he was fighting against an existing terror; that everything shows that he was not terrorised at all then. 30

MR. GRUZMAN: If I understand what your Honour put, your Honour's expressed view was from all the circumstances you would deduce, for the sake of this argument, that he was not then terrorised, and what I am submitting is that that is a psychological judgment, that is a judgment of your Honour's view of the acting of the human mind. Your Honour is then saying that your Honour's knowledge of the human mind is such that from those facts which were established in the evidence you deduce that he was not then subject to terror. 40

JACOBS, J.A.: Actually terrorised.

MR. GRUZMAN: Yes, and this is where we join issue.

JACOBS, J.A.: That is a factual matter. If you answer it by saying he was terrorised at all times, including 22nd December, I understand it. I thought you were saying the terror could be intermittent. 50

MR. GRUZMAN: I actually said the domination would be intermittent or could be. This is why I invite your Honours' attention to this book because your Honour has formed a kind of psychological view without a sufficient basis. That is why I would like to read a few passages here which puts into

better words than I can the type of submission I wish to make. At page 38 he refers to an authority of Swank who wrote in 1949 of combat exhaustion: "... his colleagues have, since 1945, published a series of papers ... than the average civilian".

JACOBS, J.A.: You have told us about that.

MR. GRUZMAN: In our submission this is very important: "The average combat soldier ... sleep for long periods", which, as to sleep, Barton was being deprived of, "... collapse".

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He deals with the mechanism of increasing states of suggestibility. At page 128 they say: "The evidence marshalled in Chapters 5 and 6 shows how various types of belief can be implanted in many people ... heightened suggestibility". I do not think I need go further than that. It is a fact of life that people who suffer fear suffer temporarily impaired judgment and heightened suggestibility. This is a fact. What are we dealing with? Here is Barton who is, according to his Honour, over this period and over a lengthy period, in a state of real fear, real mental torment and properly understood the fact is that a man in that state suffers the most common result; impaired judgment. Is it right and proper that a man can develop a relationship with another man so as to cause in him impaired judgment and heightened suggestibility and then suggest to him a contract and have him sign it? Is that what equity is about?

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TAYLOR, A-J.A.: Where did Barton say in evidence that his judgment was impaired.

MR. GRUZMAN: He never did.

TAYLOR, A-J.A.: It never was.

MR. GRUZMAN: Neither did Ryan. Ryan never said, and his Honour points out in one of the judgments, that he was in no way affected by drink either before or at any time.

TAYLOR, A-J.A.: If Barton did not say it you want us to find it?

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MR. GRUZMAN: Yes.

TAYLOR, A-J.A.: He was not cross-examined about it. I would have thought it could not have stood up. You are not content to make a case on the evidence, you are trying to make a case out of books. What are you reading all this matter to us for; it is not going to form the basis of any judgment I make because I could probably get a book to say the opposite. What are you reading it to us for? Do you want us to base a judgment on it?

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MR. GRUZMAN: I am reading it to inform your Honours' minds and to inform your Honours' minds on a matter germane, relevant and important to the decision your Honours have to make.

TAYLOR, A-J.A.: You want us to take it in and say this could have been Barton's condition?

MR. GRUZMAN: Yes.

TAYLOR, A-J.A.: That I cannot do and am not allowed to do, for the simple reason Barton never gave evidence about it. I cannot substitute for his evidence something that is in a book.

MR. GRUZMAN: I understand what your Honour is saying, but I take it, if I may say so, that your Honour will take, for example, the person who has some brain defect. There are two types; those who have what is called insight and those who do not. So that two people, each with a brain disease, one will say "I know I am mad" and the other will deny it and of the two cases by far the one which is the more serious is the one who does not realise it. I am not asking your Honour to accept something that is divorced from reality. It is the man who has a few drinks and says "I can drive better after a few drinks than when I have not", or whether it be due to liquor or tiredness it does not matter, because the human mind does not realise its limitations when it is being subjected to them.

If one has to choose between the opinion of Dr. William Sargant, who is the physician in charge of the Department of Psychological Medicine at St. Thomas' Hospital and President, Section of Psychiatry, of the Royal Society of Medicine, examiner in psychological medicine, conjoint Board of England and assistant secretary of the World Psychiatric Association from 1961, and with a string of degrees in his speciality; if one has to compare his opinion with that of a member of any Bench then I would submit, with respect, his opinion is at least worthy of consideration.

TAYLOR, A-J.A.: His opinion is not before us. You do understand if you want to put expert evidence before a court, you have to call it, you cannot tender text books.

MR. GRUZMAN: The High Court ruled in the case of the ordinary human mind ---

TAYLOR, A-J.A.: It is not expert evidence.

MR. GRUZMAN: Yes.

TAYLOR, A-J.A.: I thought you said a moment ago we should accept what this learned man said in preference to our own judgment and there is no evidence of what he said except what is written in a book.

MR. GRUZMAN: Yes, because your Honour is entitled to be informed of these matters in such a way.

TAYLOR, A-J.A.: We have to decide on the facts or inferences drawn from facts and when you say to me we should accept the evidence of some man whose

opinion is not even before the Court and who did not give evidence, that is fantasy.

MR. GRUZMAN: I myself may have thought a man who broke up under stress of war was not a good soldier, but if I thought that or if anyone thought that they are wrong. The fact is people with more knowledge than myself know that the soldier who breaks up under stress is acting quite normally, he is no less a good soldier and no less courageous.

TAYLOR, A-J.A.: What has that got to do with this case? 10

MR. GRUZMAN: It has the world to do with it because unless one has some basic knowledge of the effect of stress on the human mind one cannot really judge.

MASON, J.A.: You did refer us to this kind of material in the book in support of a submission you made on the same subject matter you are now dealing with and there is no point in covering the ground again, is there?

MR. GRUZMAN: This is a specific subject matter. 20
Having looked at the authorities the reason I have come back to this is this: what happens is in each and every case where the Court is called upon to decide the effect of a given relationship the Court, whether it knows it or not, is applying the sort of principles that Sargant speaks of. Sometimes it is obvious. If one looks at the case of Huquenin v. Baseley and looks at the sort of argument which the judge used himself when he speaks of the clergyman -

JACOBS, J.A.: We recall this case; you have read it. 30

MR. GRUZMAN: In that case they say that such a weapon could work on the human mind. In other words, everyone of these cases involves what is really a subjective approach by a court. The court is applying its knowledge and experience of human nature to a given set of facts.

MASON, J.A.: This is always so in the evaluation of evidence. There is nothing new about that.

MR. GRUZMAN: Except that where one is looking at a relationship and trying to decide what effect that would have on the average man. If it is something where one could say every judge has experience of the effect of fear --- 40

MASON, J.A.: This is precisely the submission you made to us some days ago when you referred to this book and told us the value you thought it had for the Court. All you are doing is covering precisely the same ground again.

MR. GRUZMAN: With respect, I am not. I am applying it to different matter. What I am applying it to is the relationship. I have only spoken of one matter this morning, and that is a submission 50

of law. The submission of law is that there is a relationship. That submission of law has to operate on facts. The facts are the facts of this case as understood in the light of the effect of the action of the human mind of fear.

MASON, J.A.: Its effect on the human mind of fear you have dealt with before.

MR. GRUZMAN: If your Honours feel I have adequately dealt with that then I am happy to pass on to something else.

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What do we come down to? We come down to this: if you go back to first principles you have to find there a relationship within which domination may be exercised. We have submitted the relationship between Barton and Armstrong as found by his Honour is a relationship within which domination may be exercised; a relationship where judgment is impaired, and suggestibility is heightened; the very type of relationship to which equity looks. What is significant is that in Johnson v. Buttress, as in all the old cases, you come up against all the old words. Sir Owen Dixon said: "It depends, I think, altogether on the question ... over the weaker".

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MR. GRUZMAN: So we submit on this aspect of the case we have established there was a relationship between Barton and Armstrong in which dominion might be exercised or as a result of which impaired judgment or heightened suggestibility might appear. In those circumstances the onus of proving that the transaction did not arise out of the relationship or was not affected by the relationship is on the defendant.

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MASON, J.A.: Could I ask you with respect to Johnson v. Buttress: do you agree that the law is correctly stated, insofar as it is stated, by Dixon, J. (as he then was) at pages 134 and 135 of that report?

In asking that question I ask the question merely as to a statement of law. I am not concerned about its application to the facts of this case. The passage in question commences four or five lines from the top: "The basis of the equitable jurisdiction ..." and continues onto page 135, and ends about ten lines from the top of page 136.

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MR. GRUZMAN: No, your Honour.

MASON, J.A.: You do not?

MR. GRUZMAN: No. The passages from his Honour's judgment there on which we rely is the statement of principles which appear later at page 136, commencing ---

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MASON, J.A.: You say that from page 134 to 136 --

MR. GRUZMAN: Before I answer your Honour's question

might I be permitted to have another look at it during the luncheon adjournment? We have taken as summaries his Honour's views in the passages at page 136, the passages to which I think we have referred.

MASON, J.A.: We asked the question yesterday, whether you were contending that Bromley v. Ryan overruled Johnson v. Buttress.

MR. GRUZMAN: Yes. Bromley v. Ryan is a different manifestation of the rule from Johnson v. Buttress.

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MASON, J.A.: Anyhow, I would like an answer as to pages 134 to 136.

MR. GRUZMAN: Indeed. And following on that submission which I have just made we put the case firstly on relationship and secondly on meeting. I won't refer your Honours again to the principles with which I dealt yesterday. In other words we say that firstly it is a relationship case and secondly it is a situation case (Bromley v. Ryan). We submit that for similar reasons to those which we indicated this morning as establishing relationship your Honours will now look at the situation and your Honours will say that, in our submission, at the time they met (A) Barton was in an unfair position to Armstrong. I would summarise that by saying "impaired judgment and increased suggestibility. He had those factors. And (B) that Armstrong made an unconscientious use of his position of superiority.

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That involves looking at the transaction. I am not going to take up your Honours' time, of course, with any reconsideration of the commercial transaction - I have already put that - but will summarise it by saying that this was an unrighteous agreement. It was unrighteous as between Armstrong and Barton for the reasons which I have put. It was unrighteous as between Armstrong and Landmark for the reasons I have put. It was a fraud on Barton, it was a fraud on Landmark. So our submission is that, regarded as a situation, the necessary elements are there to attract the equitable jurisdiction - superiority, inferiority and an unconscionable bargain.

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When one says an unconscionable bargain, the case of Bromley v. Ryan establishes that there does not have to be a great difference between what is commercially correct and the bargain to invite the attention of the court. In that case it was merely some 20 or 30 per cent. difference between the value by a valuer and the sale price. There are many other circumstances which suggest that that difference was not very great at all and I would refer your Honours to the judgment of Kitto, J. where his Honour says that there was nothing wrong with the bargain at all. So it was obviously a fine point.

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In this case, on the evidence the

probabilities are - even if one does not put it any higher than that - that this was a pretty shocking commercial agreement. If the plaintiff's case is correct it was a shocking fraud on him and on Landmark and that is sufficient, in our submission, combined with the other facts of the case, to throw on the respondent the onus of establishing the righteousness of the agreement and that it did not spring from the exercise of power.

When I was seeking to answer his Honour Mr. Justice Jacobs I thought I had made it clear, but I will just repeat it if I have not, that on relationship we only have to establish that there was such a relationship that within which there was a possibility of impaired judgment and heightened suggestibility. 10

I was about to mention to your Honours that, in looking at Sir Frederick Jordan's book, under the heading where undue influence must be proved as a fact, his Honour cites a number of cases - particularly Mutual Finance v. Wetton and Williams v. Bayley. 20

JACOBS, J.A.: And Williams v. Bayley, and some of your favourites are there.

MR. GRUZMAN: Yes, all of our favourites are there. We could say they could just as easily have come into the other category except for these two, Mutual Finance v. Wetton and Williams v. Bayley, and also Ellis v. Barker, of course.

Whilst I do not propose to take your Honours to it, I would only refer to this in the eighth edition of Hanbury at page 655: "Under the theory of undue influence ... a benefit conferred on him by A". In other words, it is a broad statement of the principles. They deal with the categories with which we have dealt. He describes category B, where the relationship has to be proved, and includes for example bargains with expectant heirs, moneylenders and so on. Then in the ninth edition --- 30

JACOBS, J.A.: The same editor? 40

MR. GRUZMAN: No, it is the Professor of Law at the University of London, Professor Maudesley, a Member of Lincolns Inn, Professor of Law, University of London. This is the 1969 edition. He has a somewhat different treatment at page 651. This is under the general heading of fraud - (a) general and (b) undue influence - (read). We are dealing with a clouded judgment, and remembering that the passages I am reading have nothing to do with onus, but this is a general statement concerning a man who may have impaired judgment and heightened suggestibility, and this obviously falls within the phrase "judgment clouded". Then it goes on "Actual threats ... is the more usual type of case". So that threats are said here to be just another variety of influence. 50

"But influenced by means other than threats is the more usual type of case". That is exactly what we have submitted to your Honours. "It is possible for a defendant to have obtained almost complete ... over another". I only cited that to show that in a modern text book, published in 1969, of some authority, threats are regarded as just another form of undue influence.

MASON, J.A.: Do you say that the classical case of duress at common law is also the case of undue influence in Equity? 10

MR. GRUZMAN: Yes, your Honour, as regarded in this context.

MASON, J.A.: What about onus in terms of the classical duress case at common law, if it becomes an example of undue influence in Equity?

MR. GRUZMAN: In our submission at the present day and age the onus changes, the onus is on the respondent.

MASON, J.A.: But one significant feature of difference between duress at common law and in Equity, its counterpart, is the onus? 20

MR. GRUZMAN: Generally speaking, I suppose I would not be arguing this way if that had been his Honour's judgment. Perhaps these refinements on which I am addressing your Honour would not arise, but when they do and one finds them - our submission is that if you have a gun pointed at a man's head that is an extreme case of influence which is undue and whether you regard the relationship or situation it does not make any difference to the principle, the same case is a situation case and the onus would change. We put it on two bases, relationship and situation. Then the third is based upon the principles of Williams v. Bayley and Mutual Finance v. Wetton. One can put it in two ways as, indeed, Lord Westbury does in Williams v. Bayley. The significant feature for this purpose about this case is that the threats were illegal. It is against the law to threaten to kill a man. So it is no different from the situation where the threat, express or implied, is one of prosecution. 30 40

JACOBS, J.A.: Can you give me a quick reference to the law that it is a criminal act to threaten to kill a man?

MR. GRUZMAN: Yes, your Honour; we will make some reference to that.

JACOBS, J.A.: I do not mean to obtain money or property by threatening to kill, but just a threat to kill. 50

MR. GRUZMAN: We would submit on that as a first leg it is manifestly against public policy.

JACOBS, J.A.: Well, just wait until you look up the cases.

MR. GRUZMAN: I think his Honour Mr. Justice Taylor has so found.

JACOBS, J.A.: The fact that it is under the Police Offences Act - threatening words - would not be good enough?

MR. GRUZMAN: If they are threatening words to kill.

JACOBS, J.A.: Does every criminal act introduce this principle? 10

MR. GRUZMAN: The rule behind the situation is the underlying understanding that a person will be so restrained from doing a criminal act as part and parcel of the contract - if that is the situation - yes.

JACOBS, J.A.: That is the killing and not the threat that you are more concerned with.

MR. GRUZMAN: It could be taken as either.

Where one takes it as saying "He will cease to threaten" or "He will not kill in the future" I would submit without much hesitation that that is contrary to public policy and no contract founded explicitly or implicitly upon that assumption or understanding would be enforced in Equity. 20

It does not need to be an illegal act. Take the case which I cited yesterday on the man who made an agreement on the understanding that his name would not be brought into certain criminal proceedings, there being no possibility of his being prosecuted - he having done nothing wrong. On this question of public policy it is not a matter of whether what is involved is directly illegal or contrary to some statute. 30

I did not read Collins v. Blanter (Law II, page 143) - (read). Indeed, on this consideration the deed is void ab initio. In the appendix to Pothier (your Honours need not refer to it) at page 140 they say "Many of the exceptions which fall within the scope of this ... or extortion". I think some time ago some question arose as to the authority of this court, in regard to Pothier, and might I now hand up three photostat copies of some pages from "Law in the Making, 1964" showing occasions in our law where Pothier has been referred to as authority (produced to Court). 40

I would like to refer briefly again to Williams v. Bayley.

JACOBS, J.A.: You have referred to it.

MR. GRUZMAN: I realise I have referred to it, but it sets out two further propositions. I only refer to it to summarise the principles from it. Firstly 50

I refer in passing to the top of page 216 where Lord Chelmsford deals with the matter as one of inequality between the parties - in the last five lines of his judgment. Again I reiterate that there is no suggestion that this is not a pure case of inequality between Armstrong and Barton, that no relationship whatever to his position qua the outside world existed. In this case there is a reference to his one little soft sigh, where the father was seeking to prevent the word from knowing about the son's forgery. That is all that is needed for inequality between two people, not against the rest of the world. 10

Lord Westbury makes two points: "Was he a free and voluntary agent?" This case can be looked at from two points of view. Either from the point of view of the plaintiff or from that of the defendant only. If one wishes to say "We do not care about Barton in this case, we are not happy about anything about Barton", and if one wished to take the view like that, it is by no means the end of it. Lord Westbury says there are two aspects (page 216). The first was "Was the plaintiff a free and voluntary agent ... principles of law". On that second head you forget all about Barton, he does not exist. All you look at are the proved facts about Armstrong and what Armstrong did and assume for the moment that Barton has no merits whatever and his will was not overborne, and it has nothing to do with Barton or anything that he said or anything about him but it is solely on the strength of what Armstrong did that the case could go only one way ... 20 30

TAYLOR, A-J.A.: This is what you put three weeks ago, about the threats bringing about the contract. Are you now putting that the threats did not bring about the contract?

MR. GRUZMAN: No.

JACOBS, J.A.: That the threats related to the contract? 40

MR. GRUZMAN: This is purely on public policy.

TAYLOR, A-J.A.: It is public policy not to allow anybody to force someone to do something by threats to kill him.

MR. GRUZMAN: It is public policy not to attempt to get a contract, not to effect a contract dealing with illegal acts.

TAYLOR, A-J.A.: What is sought to be done here and sought throughout the documents under public policy must have something to do with the documents; what point can there be in setting aside a contract unless it is brought about in some material aspect by the acts against public policy? You do not set it aside because the day happens to be 13th March. 50

MR. GRUZMAN: No, one can set it aside afterwards if in some way connected to the contract ---

TAYLOR, A-J.A.: This is becoming an exercise in semantics.

MR. GRUZMAN: This is what the law is.

TAYLOR, A-J.A.: The only connection is that the illegal act has to influence the probabilities, not entirely, in the bringing of it about. That is why you set it aside.

MR. GRUZMAN: Might I read a little extract from the judgment?

TAYLOR, A-J.A.: That is what he says.

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MR. GRUZMAN: At page 221, if I might invite your Honour Mr. Justice Taylor to this page, his Lordship said "... in the first place were you not well aware that these bills were forgeries ... inevitable consequence". Pausing there for the moment, there was nothing said or agreed or done about prosecution. There was nothing said or agreed or done in this transaction about threats. Up to this point threats had occurred. Was it regarded by the parties as an inevitable consequence of making this agreement that those threats would cease? Nothing having been said or considered about it? "If a man does an act which ... to be complied with". I substitute for that: that without anything having been said between the parties each of them regarded the making of the contract the means of bringing to an end the threats and the state of terror. Then he goes on to say "My Lords, I must be regarded ... mischief to the community". The difference between that consideration and other considerations that we have submitted to your Honours is that this assumes two willing parties, that assumes two willing parties - Barton and Armstrong - both sitting down and agreeing, "Let us forget our differences, let us make an agreement". Therefore, in considering this submission you are not considering so much as will overcome, you are considering his will as acting with the agreement and saying, "Yes, surely all these threats that are there will obviously come to an end under this agreement - forget the threats". That, we submit, is not a matter of semantics but a matter of commonsense and is the commonsense approach which Lord Westbury took there.

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His Lordship said that these people sat down. They never said anything about it, there they are - all gentlemen of all stages and there was no question of one threatening the other. But they all understood, without it being said, that this would be the end of it. And exactly the same words could apply to this transaction - an illegal set of acts going on, threatening death and criminals being employed and all sorts of things happening - in those circumstances the two men sit down and make an agreement. The next day Barton goes out of the hotel and back to his home. It is possibly as strong a case as it is possible to imagine as to the effect it must have had on Barton's mind, and

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in both minds, to make the agreement. On the one hand it would be the end of the threats, and, on the other hand, the end of the occasion for making them.

And of course this is another head of undue influence, but I won't enlarge on that any further.

Despite the fact that we have not said a lot on this matter up to this time we, of course, by no means abandon before your Honours the submission that this was a plain and simple case of duress. I am going in a moment to the findings that I will ask your Honours to make but the fact that I have not submitted any argument on the law on duress in Equity only means that I have taken that course because your Honours are so familiar with it.

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There are matters of conspiracy with which I do not propose to deal at this stage but what I propose to do in the remaining time is to invite your Honours' attention to the document which we submitted yesterday or the day before indicating the findings that we seek your Honours to make.

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JACOBS, J.A.: You were going to go through this document but I think you have covered most of it implicitly.

MR. GRUZMAN: Yes. The point is that I have not really drawn it together. I won't take a great deal of time on it. Before turning to it might I give your Honours the reference. I know the structure your Honour put on the illegality and your Honour said you wanted authority for illegality and might I give to your Honours the reference to s. 545B of the Crimes Act (read). I understand this followed the Rothbury riots. The penalty fixed when this was printed in 1929 was six months or £20.

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Then in s. 29 (read).

TAYLOR, A-J.A.: That was the threat that Vojinovic was supposed to have made?

MR. GRUZMAN: Yes. Sergeant Wild and Constable Follington both agreed that that was the least of the offences that Vojinovic was involved in, if it had been established - conspiracy to commit murder.

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JACOBS, J.A.: You are then going to this document?

MR. GRUZMAN: Yes. I am then going to this document and then seek the amendment.

JACOBS, J.A.: You have given little attention, of course, to the finding on inducement and what induced the agreement? I am not quite clear whether you dealt with that entirely in the factual side.

MR. GRUZMAN: It is a matter of fact, but understood in the light of the proper psychological and human approach. Some of these points are clear and I am going to refer to them when going through

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the judgment, and that particular point. We say, of course, it is an entirely wrong finding and just cannot stand.

JACOBS, J.A.: You did have some cases, but they were not on duress but on fraud.

MR. GRUZMAN: Yes. We will have those. We will also have another document for your Honours.

(Luncheon adjournment.)

MR. GRUZMAN: If I might firstly address your Honour, Mr. Justice Mason; we cannot agree that his Honour, Mr. Justice Dixon's, reason is sufficiently set forth in the two pages. We do agree it is set forth in the three pages. 10

MASON, J.A.: All I am concerned to know is in regard to the first two pages do you agree that that is a correct exposition of law?

MR. GRUZMAN: Not completely.

MASON, J.A.: Do you agree, so far as it is expounded there, it is a correct exposition of law?

MR. GRUZMAN: I do not want to cavill, but if I may say so --- 20

MASON, J.A.: You either agree or disagree.

MR. GRUZMAN: We disagree in the sense that his Honour clears up ambiguities or discrepancies on the next page.

MASON, J.A.: What do you say, that it is the three pages read together?

MR. GRUZMAN: Yes, that is exactly what we say, as to the three pages read together.

MASON, J.A.: The three pages read together as an entirety? You do not disagree with the first two pages, is it simply that? 30

MR. GRUZMAN: As expounded and explained in the third page.

MASON, J.A.: You have already read everything in its context. You have to read everything in its context.

MR. GRUZMAN: Your Honour put a specific question to me and I would like to answer in a specific way. The three pages read together we think are a correct exposition of the law. 40

We have got a third thick volume of cases which your Honours will be pleased to know we are not going to refer to in any detail. Some of them are purely illustrations of principle. At the back there is Plomp's Case, Martin v. Osborne - which are cases on circumstantial evidence. I would like

to refer to a couple for the moment. Firstly you have got the Thoroughgood Case - "If an illiterate man executed ...". The next case is Edgington v. Fitzmaurice, which is a case that your Honours may regard as of some significance. I have already referred to it briefly. This is on the question of inducement. A man there sought to have set aside the issue of debentures, his real aim being to set the issue aside on the ground that he thought he was getting a charge and in fact what the trial Judge said appears at page 481 in the judgment of Cotton, L.J. "It is true ... he would not have taken the advice". When they went into the matter that they thought that really the object for which the debentures had been obtained had been falsely stated. They intimated it was to expand the business when really it was to pay off old debts and the court said "You cannot do that". It was said the real reason he got this debenture was because he thought he was getting a charge.

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That is his case. Cotton, L.J. said, "But if he also relied on the mis-statement ... the defendants will still be liable". At page 483, Bowen, L.J. said "The question remains, did this mis-statement ... more a question of fact". There was a pleading trouble in that case too. Fry, L.J. at page 485, at the end of the case, said (reads from page 12 of Law II).

Again, in the next case of Reynell v. Sprye (page 13) I just mention this on the point we were discussing before lunch. (Reads headnote.) On the point we are now discussing, paragraph 3 is the relevant one. "Where one of the parties to a negotiation induces the other to contract ... discovery of the error". So the principle is if there have been a number of representations of which one is untrue, it is all part of the inducement. At page 728, this fellow said that he was getting promissory notes or bills that this young man had put out and was advancing his money for that purpose when in point of fact through devious means he already had them. He got the bills all right, but as to the source of them he misled the young fellow. That was all there was in it. At page 15 (page 728): "... make out there has been anything like deception ... still less to another". The other matter, which is very important, is "where certain statements have been made all in their nature capable of more or less leading the party ... valid". That is directly contrary to his Honour's judgment on this question of inducement. "Where, therefore, in a negotiation between two parties one of them induces the other ... in the mind of the party to whom it was addressed".

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TAYLOR, A-J.A.: Are you citing those cases in support of the argument that there are two cases - Barton entering into the agreement of the 17th - one found by his Honour Mr. Justice Street, and the threats? Is not that what you are putting?

MR. GRUZMAN: Yes, your Honour, and it is said: "... they need but be ... assent".

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There is just another principle on that point. Towards the bottom of that page it is stated "no man can complain that another has implicitly relied on the truth of what he has himself stated". In other words, Armstrong cannot complain if it is inferred against him that Barton acted in part or in whole on the threats that Armstrong made.

JACOBS, J.A.: "To implicitly" my copy seems to read, which seems to be something different.

MR. GRUZMAN: We put it as meaning the same thing. The word "to" is almost rubbed out in my copy. If you intermeddle in these things you take upon yourself the whole of the ---

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JACOBS, J.A.: That is not what that means. I would not have thought it had anything to do with that principle at all. In that passage he is saying that if a man gives advice and makes representations, the fact that you take his advice and act on his representation does not mean that you thereby debar yourself from relief. This man had recommended someone to go to an independent advisor, and he said that does not do any good. Of course negligence is required, and that is the bit that goes to it.

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MR. GRUZMAN: We are putting it as referring to a principle that if you do something wrong, one thing wrong out of a hundred, you cannot complain that the other person says "The very thing I relied on was that very thing that influenced me".

JACOBS, J.A.: I think that passage is dealing with something entirely different.

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MR. GRUZMAN: At page 226 there is a report on Williams' Case, being a report on a previously unreported case. What happened was this, Payne's Case was about directors who were deceived because contributing shares were transferred, and this is the report on Williams' Case. One of the points made was that they might have done the same thing even if there had been no false statement made. That is the significance of this.

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TAYLOR, A-J.A.: He said if they had known the truth it would have been their duty to exercise these powers and the directors could have refused it.

MR. GRUZMAN: It is a different position but the question was "Is it said that Barton would have done this whether or not Armstrong threatened him?" That is what I am addressing myself to. The learned judge said that Barton would have done this whether or not Armstrong threatened, and this case says that Equity is not in the habit of considering that a falsity is not to be looked at even the same result might have occurred had the truth been told.

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TAYLOR, A-J.A.: Are you saying that that finding

in his Honour's judgment does not support you because of this principle of law?

MR. GRUZMAN: That is on this argument. It says here that Equity won't consider that the same result may have occurred notwithstanding the imposition of pressure or, in this particular case, the telling of a falsehood. That is exactly what the judgment says.

JACOBS, J.A.: You say that Mr. Justice Street was looking for *causa causans* or *causa sine qua non* instead of looking for *causa justa*? 10

MR. GRUZMAN: Yes, there is no doubt about it. I have referred your Honours to his Honour's judgment.

Might I now refer to the next case of Smith v. Kay, which is to the same effect. I am only going to read three lines of the headnote on page 21. (Read). He cannot deny that it was obtained by reason of that deception.

JACOBS, J.A.: But you have got to look at the sentence before. I think we all know where the onus lies in a fraud case, the onus of proving that the allegation was material does not lie on the plaintiff but the onus of proving inducement does. That is my recollection of fraud cases and that is all it is saying there - "He cannot be allowed to deny its materiality". 20

MR. GRUZMAN: It is a general principle. What we are relying on here is a general equitable principle.

JACOBS, J.A.: Which is different from the common law onus in relation to fraud? 30

MR. GRUZMAN: Yes. That is illustrated in the third paragraph on page 24, about half way through that paragraph: "But can it be permitted of a party who has practised a deception ... to ratify the transaction which was brought into being by the misrepresentations which were designed to be made to him". We put that as the principle.

JACOBS, J.A.: I read it with the previous sentence where it says "Now it is contended that this representation is wholly immaterial", and I would read the rest of it as an exposition of materiality. 40

MR. GRUZMAN: Accepting what your Honour says, why is it so - that immateriality has to be proved by the defendant? This is not relying on principle - this is worked out on first principles. The court here works it out on first principles and says that you do not have to prove materiality, the defendant has got to disprove it. That is why, not based on some authority or rule but based on this equitable or, for that matter, common law principle it is a matter of commonsense. You do not know what is the real operating factor. Once you have proved someone has done something wrong, such as the directors' deception, it is up to them. They have to disprove that that is what caused the contract. 50

JACOBS, J.A.: That is the contract and common law situation, is it not?

MR. GRUZMAN: Yes.

JACOBS, J.A.: Has it ever been said that Equity applies a different rule on influence in a case of fraud? No.

MR. GRUZMAN: So far as we know, this is the authority. It is not an authority which, so far as we know, has been overruled.

JACOBS, J.A.: It is dealing with materiality, not with inducement. 10

MR. GRUZMAN: We are dealing with this one point of materiality. It is by application of first principles, not by the application of the rule of law or Equity - previously considered - but a principle first arrived at.

JACOBS, J.A.: Then, what is the next case?

MR. GRUZMAN: The next set of cases are instances of the application of the principle of undue influence. The first is Dent v. Bennett (reads headnote). 20
May I refer also to the passage at page 107: "In such a case it may at least be said in the language of ... that the thing is righteous". That is the principle of the reversal of onus. In matters such as these, if you start dealing with someone to whom you are superior or you believe - being in the relation with them - that they are likely to give way to you, and if you start doing things like that then the Equity Court will require you to prove that the whole thing is righteous. 30

At page 108 appears this principle again:
"How it was affected, whether by direct fraud or by what other means ... being satisfactorily established, again because of the difficulties of proof".
That is why the onus is reversed.

Lyon v. Home was a spiritualist case and in its day it broke new law. At page 50, there was an amendment and your Honour, Mr. Justice Taylor, might be kind enough to note that at the top of page 50 of the document there is argument on the amendment and so on. This is a matter which I have to submit to your Honours later. "I think there was no issue or material allegations of fact of which each side was not materially apprised ...". That is the matter on which I have to satisfy your Honour Mr. Justice Taylor and your Honours in due course. Then they quote again. Again they have got to come back to the first principles and they say "How is the spiritualist brought up?" Then you go to Hatch v. Hatch - "I will not run the risk ... but the principle". Then of course he holds that the onus is changed (page 678). They repeat again "It has to be watched with a jealousy almost invincible ...". There is on the defendant the whole onus - the last words in the judgment at 40 50

page 50 - "Whether or not she has ... of the highest public utility".

In Inche Norish v. Sheik Alie Bin Omar, a Privy Council case on this matter (page 59) - I do not think your Honours will find any new assistance in it. It is not a traditional case, it is a case of a woman and her nephew but it was held that a presumption arose of similar principles to the Skinner Case, which is a recent Privy Council case, in case your Honours would wish to look at it.

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In Turnbull v. Duval, another Privy Council case, where the pressure is that of a husband and on a wife, he concealed from her the extent of his debts. Maitland v. Irving is another instance of undue influence. Sercombe v. Sanders (page 81) is an instance of securities given for a debt by the plaintiff six months after he attained the age of 21. It is interesting to note that this relationship of guardian and ward continues for years after the true relationship had ended. Solicitor and client relationships continue even though there is no current work being done or no current retainer. It suggests that the parties are, shall we say, known to one another as solicitor and former and possibly future client.

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Berdoe v. Dawson is another of the examples, being a father and child matter. Romley M.R., having had some experience of these cases, as we know, at page 769 said "Where a person executes a deed by which his father or any other person nearly related or connected with him ... without being subject to influence". The last few lines of that at page 87 might also throw another light on the matter. "The Attorney General pressed very much the circumstance that these young men were, comparatively speaking ... I think they are entitled to the protection of this court". Noting there that that is a fear case - it was not because they trusted their father, it was a relationship of fear; fear of their father.

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TAYLOR, A-J.A.: Fear of his displeasure.

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MR. GRUZMAN: Yes, and fear of financial ruin of the business in which they were interested. So you had two factors there, whether you call it displeasure ---

TAYLOR, A-J.A.: That is what they call it.

MR. GRUZMAN: Yes, whether one calls it ---

TAYLOR, A-J.A.: It was important in that day and age, I suppose, not to incur a parent's displeasure. Filial duty required at least that.

MR. GRUZMAN: But the point I am seeking to make is that this was not done for love of the party or trust or confidence in the party, it was done in fear of something - of the father. It does not matter that it was displeasure. It was a mild case.

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If it was fear that the father would kill them, it would not bear talking about. But the principle must have been the same, whether it is fear of displeasure or fear of death. Here is a case where there was double fear: fear in respect of the father and fear of financial ruin. And here again, so spoken, it is reminiscent of the case before your Honours: finding fear, if one likes, a financial fear plus fear of another kind. The court would not have the slightest difficulty in that.

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I do not think I need refer your Honours to the next few cases at all on this point.

JACOBS, J.A.: Still, they are very useful for us to have and we thank you for them, Mr. Gruzman. But it is no use going through them if they are only instances showing the developing law. That is your point?

MR. GRUZMAN: Exactly.

JACOBS, J.A.: I think we are quite clear about that.

MR. GRUZMAN: Incidentally, Nottidge v. Prince - "This case is an unquestionable authority".

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Perhaps I will not deal with the other three cases at this stage but just mention them. There is Skinner's Case, Plomp's Case and Martin v. Osborne - two cases of circumstantial evidence which may have to be dealt with at a later stage but they are there if your Honours wish to refer to them.

I did indicate during the course of the submissions on the commercial document that I would hand your Honours copies of the document handed to Mr. Justice Street by the defendant before his Honour on the commercial negotiations showing where, we submit, is the error of his Honour in not referring to clause 15. I have only two copies available just now and we are trying to get another copy at a later stage. (Produced to the Court.) That is a document which was handed up by Mr. Staff or Mr. Bainton to Mr. Justice Street and it finds reflection in his Honour's judgment. The only matter I would like to refer to is if your Honours would turn to page 12, it goes through the differences between the two documents and refer to clause 15 which, as I have indicated, and will not say again, is a very material page.

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JACOBS, J.A.: Your point is, is it not, that if there had been a delay between 17th January and the date of settlement, say it was not until the 31st, and if during that period a receiver had been appointed Mr. Barton would still have been bound to buy the shares but there would not have been the arrangement for the loan of the money?

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MR. GRUZMAN: Yes, that is what the draft says.

TAYLOR, A-J.A.: It is not in the document of the 17th.

MR. GRUZMAN: It is not in the final document.

TAYLOR, A-J.A.: That was precisely the position as at the 4th. It they agreed on the 4th, nothing was said about the receiver, and everybody could have backed down if the receiver had been appointed on the 10th.

MR. GRUZMAN: There were only three points discussed on the 4th.

TAYLOR, A-J.A.: You are talking about the legal effect. I am saying that the legal effect of the 4th, if there was such an agreement, qua what happened if a receiver was appointed, was precisely the same as on the 17th. Nobody had to go on at the 4th if the receiver was appointed because it was an oral agreement. 10

MR. GRUZMAN: Your Honour, Mr. Justice Taylor, is putting that Street, J. was right in saying that there was an agreement on the 4th which did not change until the 17th?

TAYLOR, A-J.A.: No. He said there was no substantial difference between the agreement of 17th January and the agreement made orally on the 4th, and you are saying that there was a substantial difference. I answer you by saying that on the 4th, if the receiver had been appointed Barton did not have to buy the shares. 20

MR. GRUZMAN: On what basis, your Honour?

TAYLOR, A-J.A.: Because nobody had signed any agreement, it was an oral agreement.

MR. GRUZMAN: If one assumes the agreement of the 4th took place --- 30

JACOBS, J.A.: To just summarise your position again, Mr. Gruzman, you say that the agreement of the 4th made no provision for frustration at all and the money would have to be loaned in any case and Mr. Barton would have had to buy the shares in any case?

MR. GRUZMAN: There was nothing said, as at the 4th; and if you assume the agreement, the agreement continued whether or not a receiver was appointed. In other words, if the shares became valueless because a receiver was appointed then the transaction still had to go on and Armstrong got \$280,000 for nothing. 40

TAYLOR, A-J.A.: You do not seriously suggest that would have happened! How could anyone be forced to go on?

JACOBS, J.A.: I am still at a loss to understand how you can say you were worse off by that variation. 50

MR. GRUZMAN: No, your Honour, we do not. First

of all, may I make it clear that his Honour Mr. Justice Taylor mentioned the 4th and what we were referring to was something not implied but something to what the two documents, the draft document of the 6th and the final document of the 17th, referred to - but there was a material difference between those two documents which are in evidence and which his Honour Mr. Justice Street overlooked. His Honour overlooked this because, we suggest, the document handed to him by the defendant inadvertently did not refer to it. The material difference is that in clause 15 of the draft document of the 6th it specifically provides that if a receiver is appointed between contract and settlement, notwithstanding that the shares are valueless, Barton has to buy them and Landmark has got to buy his other shares and the \$400,000 impliedly has to be paid back and the \$300,000 is not to be advanced. And at that stage they were contemplating a gap of some weeks within which it was likely that the receiver would be appointed. In the final agreement that was altered - altered to provide that if the receiver was appointed the contract was all off.

JACOBS, J.A.: That was in your favour.

MR. GRUZMAN: That is so.

TAYLOR, A-J.A.: Do you mean to say we have spent all that time about you getting more favourable treatment in the agreement?

JACOBS, J.A.: I imagined you were saying that somehow or other your position had deteriorated.

MR. GRUZMAN: No, that was the matter when it got between the solicitors for the parties - it does not matter, it is only directed to the one point, his Honour's finding that there was no difference between the position on the 4th, the 16th and the 17th.

TAYLOR, A-J.A.: "No difference" - that was not his finding. He said "No material difference", and referred to documentation.

JACOBS, J.A.: No material difference, and by "material" I would understand his Honour to mean material to the threat.

MR. GRUZMAN: With respect, looking at his Honour's judgment, if I remember rightly, the words were ---

JACOBS, J.A.: I misunderstood your argument. I thought we were examining at that time the position of Mr. Barton having deteriorated, and therefore you could not say that the threats did not have an effect because he had already agreed. In fact his position improved.

MR. GRUZMAN: On the 4th he was in the position that had the receiver been appointed he would still have had to go on with it.

TAYLOR, A-J.A.: Why do you say that?

MR. GRUZMAN: Because there was no provision that the transaction would not proceed or that it would be frustrated by the appointment of a receiver.

TAYLOR, A-J.A.: There were no documents at all.

MR. GRUZMAN: No documents at all, that is right.

TAYLOR, A-J.A.: I would have thought that meant he was not bound to go on, and if he was not bound to go on at all, ergo he was not bound to go on if the receiver was appointed.

MR. GRUZMAN: As at the 6th, what was the position - 10

TAYLOR, A-J.A.: What does the 6th matter? The only significance on this matter is that Mr. Justice Street said there is no substantial or material difference between what was provided orally and in the agreement of the 17th. There is no material difference and he uses that as a basis for saying "I do not believe that after that time certain threats were made". He said "That is one good reason for disbelieving the threats of the 12th, the 13th and, possibly the 16th. He also used it for saying "What was the point in threatening him if he had already signified his agreement?" When you compare the two situations I would have thought you were only directing your mind to what was the bargain. The fact that at some time in between some lawyers drew up documents which had different provisions about the appointment of receivers had nothing to do with what Mr. Justice Street directed his attention to. Your attack had been that there was never the agreement on the 4th, and you relied on certain words used when he confronted the police, but if this is the thing you concentrate on - and it must be the only type of matter here - what has the document got in it? 20 30

MR. GRUZMAN: I think I understood your Honour to say, "there being no difference in the agreement there was no occasion for threats".

TAYLOR, A-J.A.: That is what his Honour found. His Honour used that as a basis for saying there was no basis for threats. 40

MR. GRUZMAN: If your Honour, with respect, is under the impression - as to what is in his Honour's judgment ---

TAYLOR, A-J.A.: I would sooner not discuss it. You have taken up too much time on it already.

MR. GRUZMAN: Might I address your Honours, Mr. Justice Jacobs and Mr. Justice Mason?

On 12th January his Honour found as a fact that Armstrong telephoned Barton and said "Sign this agreement or else". His Honour never found there was no occasion for threats after the 4th or there were no threats. On the contrary he found a case of threats and threats, and the significance 50

of the draft document is that at the 6th when Armstrong was presumably instructing Grant he felt sufficiently strong to instruct Grant that a clause had to go into this agreement under which Barton would have to pay \$180,000 for shares if they were rendered worthless by the appointment of a receiver, and Landmark would have to pay \$100,000 for shares if they were rendered worthless by the appointment of a receiver. He did that on the 6th, and that was put into writing, and on the 7th Vojinovic appeared. The fact that later on the solicitor for Landmark simply would not be a party to such a ridiculous agreement - that clause was then altered in the final agreement - is nothing to the point. The position is that at the 6th Armstrong felt his position of superiority to Barton was so great and so immense that he stipulated that he would get \$280,000. It is a matter of no small significance. 10

JACOBS, J.A.: I can understand what you put there. That seems to be little to do with Mr. Justice Street's finding about a material change in the terms because on the 4th in the absence of anything being said either the parties would have both been bound to go on with the contract or the appointment of a receiver would have frustrated the agreement, one or the other. 20

MR. GRUZMAN: One or the other.

JACOBS, J.A.: When the final agreement was reached the appointment of a receiver was expressly to frustrate the agreement. If you say there is a material difference between those two terms I am really most surprised. 30

MR. GRUZMAN: Potentially there is a difference of \$280,000. That is all, and his Honour said at page 3163: "The draft is in evidence ... between the two documents".

JACOBS, J.A.: In your favour, not against you.

MR. GRUZMAN: It is the significance of it which escaped his Honour. We have put an argument where we show it is significant. Your Honours said you understood what we put. A significant difference escaped his Honour and it did escape him because it was overlooked in the document handed to his Honour. 40

JACOBS, J.A.: Now I understand you to say your position improves but nevertheless the improvement is material there and, therefore, his Honour should not have used the word "material"?

MR. GRUZMAN: If our submission is right that Armstrong on the 6th was able to impose a term whereby he would get \$280,000 for nothing. 50

JACOBS, J.A.: He could not impose it.

MR. GRUZMAN: He sought to. We are looking at his state of mind and position of superiority. If I may remind your Honours, in this case you had

another solicitor and you had Grant, who was not a party to the pressure so that if as between the two solicitors, neither of whom was, on the one hand, applying or had knowledge of the application and the other, who was not subject to the pressure; if as between two solicitors that clause was altered it does not alter what was in Armstrong's mind.

MASON, J.A.: Are you suggesting but for the existence of the solicitor it is to be inferred the plaintiff would not have resisted the demand made by Mr. Armstrong? 10

MR. GRUZMAN: He did not resist anything else. Armstrong felt he was in such a strong position that he could insist on the receipt of \$280,000 for goods which he knew were worthless, and one would not have much doubt on the evidence that Barton would have agreed to it.

Mr. Coleman, the solicitor for Landmark, would not agree to it, and I venture to say when Mr. Coleman put it to Grant, "You realise your client will get \$280,000 for something that is worthless", Mr. Grant, as a solicitor, would have said, "I really cannot maintain that", but he did not realise that Barton would have agreed to it because of the pressure, in the same way he did not know that Barton would agree to pay the 60 cents merely because Armstrong asks for it although he had instructions to reduce it to 50 cents. This is part of the proof of the effect of the pressure. 20

JACOBS, J.A.: The making of a demand, the exerting of pressure, the withdrawal of the demand. You said 6th January, the making of the demand; the 7th January, illegal pressure; the 10th or 13th January, withdrawal of the demand. 30

MR. GRUZMAN: If I may say so that is not a fair evaluation of the facts because there never was a time between those periods when Armstrong faces Barton or when it was put up to Barton. What happened was that the solicitor for the third party, Mr. Coleman, who was not subject to threats, would not agree to it and Mr. Grant, who was not party to the threats, made an automatic note, "If receiver appointed, all off". If he knew what a position he would have been in because of his client's threats, he would have acted differently. 40

The clause in itself was so extraordinary it would not have come out in Mr. Grant's mind; it must have come out in Mr. Armstrong's. Once that clause went out it increased the urgency of settlement. That is why you have the contract on 17th, settled on 18th, and to be settled on the 18th in default of the more severe penalties on Barton, he to give up his position, Armstrong to take control; everything is to happen unless that transaction was settled the next day. Also is it unlikely in those circumstances that Barton having been threatened by Armstrong on the 12th, and there still being 50

no signature, that he was threatened on the 16th?
I will come to that in a moment.

JACOBS, J.A.: We have been to it.

MR. GRUZMAN: I am going to take your Honours through the findings we seek your Honours to make. On this point I point out his Honour said at page 3186, line 10: "This finding places Mr. Armstrong in a position of having made a direct threat on 12th January regarding the signing of the agreement".

That is what his Honour Mr. Justice Street said. There is no question of any mistake or anything like that on the part of his Honour in that finding. 10

JACOBS, J.A.: No doubt we will hear from Mr. Powell how he reconciles that with the earlier finding that Mr. Armstrong did not intend to coerce.

MR. GRUZMAN: In the course of making our submissions on the commercial document I told your Honours we would submit a document showing the arguments where his Honour is incorrect in finding Mr. Armstrong was a reluctant vendor. That appears at page 54 of a document which we are handing up and which summarises the submissions we have already made on the commercial side of the transaction. 20

JACOBS, J.A.: You went through these?

MR. GRUZMAN: Yes.

JACOBS, J.A.: These we will not only find in the transcript but more or less in here?

MR. GRUZMAN: Rather more convenient and somewhat shorter. 30

In making the submissions on the commercial aspects when I came to reluctant vendor, which is a very important element, I said I would submit a document. I am not going to read it now. Your Honours are familiar with the argument but it does start at page 54 and it is a matter we particularly invite the attention of your Honours to. It does not appear in the transcript in detailed form at all.

JACOBS, J.A.: I am having difficulty in seeing how it could be described as "reluctant" after the diary entries. It is well arguable he is not pressing, although you would put the opposite. He may have been reluctant certainly until the general meeting of the company, he would not have wanted to be a vendor. You say it changed on 8th December? 40

MR. GRUZMAN: What I propose to do now is to take your Honours, as shortly as possible, through the document to invite your Honours to make the findings which we seek. Before so doing I would refer to his Honour's judgment, to the parts that do not 50

appear there as findings of fact. I refer to page 3102 of the judgment to show, firstly, what his Honour set out to do. At line 5 his Honour said: "In determining whether this case has been made out two main questions arise. Firstly, did Mr. Armstrong threaten Mr. Barton and secondly, was Mr. Barton intimidated by Mr. Armstrong's threats ... denies them both".

The first point I make, on the alternative is that we are not making the submission that we assert Mr. Barton was intimidated by Mr. Armstrong's threats - 10

TAYLOR, A-J.A.: You indicated that before Mr. Justice Street?

MR. GRUZMAN: Yes.

TAYLOR, A-J.A.: What I cannot understand is how for three weeks you have been putting another case. If you do not get an amendment it is gone. Why do you leave it till last?

MR. GRUZMAN: Because one of the questions as to whether your Honours will grant leave to amend is whether you are convinced the grant of a leave may be important to the result of the case. The Courts have held they have to know whether the amendments are material. If those amendments may be decisive of issues between the parties then the Court is disposed to grant the amendment. If not, then it does not. 20

TAYLOR, A-J.A.: You have to be satisfied they are not amendments which would entitled the other side to call evidence, to cross-examine, and which affects the course of the trial. 30

MR. GRUZMAN: You have got to be satisfied on all of that.

TAYLOR, A-J.A.: And that we could retry the case on the transcript on those amendments.

MR. GRUZMAN: Exactly. That is not infrequent on the authorities.

TAYLOR, A-J.A.: Unless those amendments are made is there anything in this judgment you challenge?

MR. GRUZMAN: Yes, we say his Honour's basic findings are incorrect. 40

TAYLOR, A-J.A.: Findings of fact?

MR. GRUZMAN: Yes, the basic inferences from the facts are not correct. I only set out to show although we are seeking different findings of fact from his Honour it is consistent in some respects with what we are putting that his Honour may well have found the way we seek your Honours to find on some of these matters, if they had been put to his Honour, but they were not. First of all, his Honour set out to find, the onus being on the 50

plaintiff, whether it was proved Barton was intimidated by Armstrong into signing the agreement. His Honour said at line 21: "Success or failure for the parties in the suit ... affirmative finding".

That is the guide note to his Honour's judgment. If he makes a finding against Mr. Barton it is not because he does not believe Mr. Barton, it is because Mr. Barton accepted the onus of proof and his Honour said in any case where he is not satisfied that onus has not been discharged he will necessarily find against Mr. Barton because on the onus he is not satisfied. 10

TAYLOR, A-J.A.: If he believed Barton on some of these matters he would have no trouble with the onus. If he believed Barton of Hume seeing him, there would be no difficulty with onus.

MR. GRUZMAN: His Honour said, "I have to be satisfied. It is a serious allegation and this is the onus".

TAYLOR, A-J.A.: There is the matter of Barton's son. 20

MR. GRUZMAN: Whether he called his son had nothing to do with it. His Honour set out the modus operandi and following that approach his Honour came to that conclusion. His Honour made it abundantly clear, as clear as a Judge could make it, that if he found against Barton it was not because he disbelieved Barton. His findings may have been inaccurate in some respects, but his findings were based on onus. No member of the Bench can do more. At page 3116, line 30, having accepted masses of Mr. Barton's evidence about threats and so on, fear, documents, etc., having accepted all of that he then comes to his inference, "I do not accept, however, that Mr. Armstrong's threats and intimidation were intended to coerce Mr. Barton into making the agreement ... 18th January". These are the matters which we had accepted the onus to prove. Before your Honours we disown that onus. 30

TAYLOR, A-J.A.: You disown it if you get the amendments. 40

MR. GRUZMAN: For the purpose of this submission.

JACOBS, J.A.: You say there are certain findings of fact that have been paid?

MR. GRUZMAN: Yes.

JACOBS, J.A.: You wish to deal with those on the case that was made before Mr. Justice Street?

MR. GRUZMAN: Yes.

JACOBS, J.A.: If the amendments were allowed, to raise the question of relationship of influence and its ancillary matters in the manner you have 50

submitted to us there would be much evidence upon which you have relied upon which there are no express findings of Mr. Justice Street and on those you would ask us to make our findings now?

MR. GRUZMAN: Yes, and in addition, the findings made by his Honour, such as the one I just read, "... or that they did coerce". That finding was made in the light of the onus.

TAYLOR, A-J.A.: If you have got your amendments that would not worry you, it would be reversed? 10

MR. GRUZMAN: Exactly. May I take it on the assumption that the Court allows the amendments that those findings other than those which are not in dispute before your Honours may be taken to be at large?

JACOBS, J.A.: Let us say, subject to review. It would throw a different aspect and light upon those findings of his Honour which depended to an important extent on the onus of proof as he saw it.

MR. GRUZMAN: Yes. Indeed, our submission is that any finding of his Honour which depends on an onus different to the onus propounded before your Honours, on the assumption the amendments are allowed, is irrelevant. One could not even look at a finding by the trial judge that he was not satisfied that coercion had been proved if he applied the wrong onus; the wrong onus being in the sense in which I have used it here. 20

TAYLOR, A-J.A.: If you did not carry the onus and the other side carried it, it would not matter to your case if he was not satisfied about the onus? 30

MR. GRUZMAN: Yes. From here on I will be referring to those matters in his Honour's judgment with which we disagree. I refer your Honour Mr. Justice Taylor, to page 3117, line 30: your Honour asked earlier today whether Barton, in effect had said that he had been coerced. His Honour certainly regarded him as asserting that. He said: "It is quite possible ... purchasing the shares". There is no doubt he was genuinely and sincerely claiming that before his Honour. He goes on to say he was not satisfied he was in truth coerced. That is a matter of onus but so far as Barton's claim, it was unmistakably before his Honour and so regarded by his Honour. 40

TAYLOR, A-J.A.: I understood his Honour to be saying there if Barton believed that he had been coerced, that belief would come about by a reconstruction.

MR. GRUZMAN: He does not accept it as proved. Your Honour suggested did he say that he had been coerced. He sincerely believed, and said, and maintained that he had been coerced. 50

JACOBS, J.A.: Were these agreements assigned after they were made?

MR. GRUZMAN: I believe that there is no evidence on it.

TAYLOR, A-J.A.: The benefit of these agreements had been assigned.

JACOBS, J.A.: There is no evidence before us of any assignment?

MR. GRUZMAN: No.

TAYLOR, A-J.A.: It took place after the suit had started. 10

MR. GRUZMAN: There was something went on, but I do not think it is a matter that will trouble your Honours. The assignees, if they were assignees, are parties to these proceedings. They all are parties. If it came to the point, they are parties.

JACOBS, J.A.: In another right?

MR. GRUZMAN: As contracting parties.

JACOBS, J.A.: They were all contracting parties originally. 20

MR. GRUZMAN: I would refer your Honours to a book called "Causation in the Law". His Honour Mr. Justice Street refers to the fact that Barton, on some of these things, reconstructed. At page 52 of this book it says: "The question whether or not a given person acted on a given occasion for a given reason ... or his state of mind at the time". In other words, an honest witness tries to reconstruct.

TAYLOR, A-J.A.: The first time in writing there ever appeared a claim your client entered into the agreement because of the threats of Armstrong was in the statement of claim. 30

MR. GRUZMAN: No.

TAYLOR, A-J.A.: Where else is it?

MR. GRUZMAN: In the affidavit.

TAYLOR, A-J.A.: Is it in evidence?

MR. GRUZMAN: No.

TAYLOR, A-J.A.: Do you mean in the affidavit in the interlocutory proceedings in January 1968? 40

MR. GRUZMAN: Yes.

JACOBS, J.A.: When was the statement of claim made? After the interlocutory proceedings?

MR. GRUZMAN: Yes.

TAYLOR, A-J.A.: It was in these proceedings.

MR. GRUZMAN: Yes. Remembering, of course, there was specifically disowned by the defendant any defence of latches or delay.

TAYLOR, A-J.A.: It is a question of whether this was ever the fact or something was thought to be a good answer to the situation in 1968.

MR. GRUZMAN: There was specifically disowned before Mr. Justice Street by Mr. Staff any defence based whatsoever on latches or delay.

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JACOBS, J.A.: It seems to me Mr. Staff said "But I do rely on the delay upon the primary question whether there were any threats and what effect they had".

MR. GRUZMAN: And so we were able to lead into evidence some of the threats which continued and some of the Follington matters because it was apparent on the evidence Follington was the one who was keeping Barton going, saying "We are going to arrest Armstrong at any time".

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JACOBS, J.A.: You had to prove all those things.

MR. GRUZMAN: We were not allowed to in chief. We got some of it in in reply because of this particular matter to which your Honour referred, but Mr. Staff objected to it in chief.

JACOBS, J.A.: You were never put to the proof of a continuing duress.

MR. GRUZMAN: No, we were not allowed to prove that.

TAYLOR, A-J.A.: You led evidence of telephone calls in 1966, and frightenings.

MR. GRUZMAN: Only on that limited basis; on Wednesday, 30th October, 1968 on the 50th day of the hearing Mr. Staff said: "We do not seek ... ever did happen".

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JACOBS, J.A.: That is what my brother Taylor was referring to.

MR. GRUZMAN: It appears in the transcript of the addresses which is not before your Honours.

JACOBS, J.A.: There is something in the transcript of evidence.

MR. POWELL: It is at page 3207 of the judgment.

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JACOBS, J.A.: Were the addresses taken down by an official shorthand writer?

MR. GRUZMAN: Yes. That is an extract from the official report. We will give your Honours the reference to where it appears in the evidence.

JACOBS, J.A.: This was apparently disclaimed as a defence.

MR. GRUZMAN: If it was not we could have proved it. We were prepared to prove it.

JACOBS, J.A.: Your pleading alleges that he did fear and now fears, and there was an issue joined on that. The words of the Judge in the light of the transcript of the addresses it seems to me at the moment, subject to what Mr. Powell may say, to leave little left in the obligation of the plaintiff to prove a continuing fear as part of his cause of action. 10

MR. GRUZMAN: I can take it even further. At page 84 of the transcript, whilst the plaintiff was in chief, he being the first witness, line 29, I led this evidence. There was an objection and there was argument and we both addresses his Honour and his Honour then ruled: "Mr. Gruzman now foreshadows ... is not presently relevant".

We did not lead any evidence of it and it was on the 50th day in the course of Mr. Staff's address that he made this complete disclaimer. 20

TAYLOR, A-J.A.: The evidence was led by the cross-examination by Mr. Staff.

MR. GRUZMAN: He made some cross-examination on it which led to further evidence. I am reminded by Mr. Priestley his Honour, Mr. Justice Street, raised the question with Mr. Staff from time to time during the course of the hearing and the addresses and it was the fact his Honour so raised it that led Mr. Staff to make that complete disclaimer. 30

Referring again to the document I handed to your Honours, on page 3116, "I do not accept, however, that Mr. Armstrong's threats and intimidations were intended to coerce Mr. Barton into making the agreement". We ask specifically for the finding (B) that in any event Armstrong's threats and intimidations were intended to coerce Barton.

TAYLOR, A-J.A.: Into signing this agreement?

MR. GRUZMAN: Yes. My arguments now are not going to be exhaustive; they assume your Honours are now fully familiar with the evidence but specifically I am referring to the threat of 12th January which was, in terms, a specific threat to enter into this agreement. 40

JACOBS, J.A.: "Sign the agreement, or else"?

MR. GRUZMAN: Yes. It is inconceivable that meant anything else other than what it said and indeed, his Honour does not find so.

JACOBS, J.A.: His Honour found it was a threat. 50

MR. GRUZMAN: To enter into this agreement. At page

3185 it says: "The next occasion Mr. Armstrong ... by reason of any threat of physical violence". That is a different matter. The first question is what was Armstrong's intention?

JACOBS, J.A.: Speaking for myself I appreciate something has got to be explained there and perhaps Mr. Powell may have an explanation but you rely on the fact, and the Judge's finding on that. What else apart from that?

MASON, J.A.: You did say in answer to a question put by my brother Taylor that the finding (B) you sought was a finding that Armstrong's threats and intimations were intended to coerce Barton into signing the agreement. I follow that perfectly well in relation to 12th January. What about earlier threats and intimidations commencing at the beginning of the period which you seek to make out? 10

MR. GRUZMAN: Briefly, our submission is this: They were all threats intended to advantage Mr. Armstrong vis a vis Mr. Barton in the commercial situation which existed between them from time to time. In other words, if he wanted to disadvantage him in respect of the general meeting he threatened him. If he wanted to disadvantage him in respect of any given negotiation he did so, so his purpose at any given time was to advantage himself and disadvantage Barton in the commercial context existing between them. I will come to that shortly. 20

If your Honours would turn to page 12, I have briefly pointed out the finding as to Armstrong's intentions with respect to the threats. At page 12 is the finding of his Honour with respect to Barton's belief as to the threats. His Honour said: "He did not in his own mind relate ... Mr. Armstrong. 30

The finding we seek from your Honours on the evidence is that Barton, in his own mind, related Armstrong's threats to a desire by Armstrong to force through the agreement. That follows, at least, from the threats of 12th January. I am not speaking of the effect on Barton's mind, I am speaking of what Barton understood Armstrong wanted by the threats: "Such agreement was forced through ... to harm him", that is the ultimate finding. "Barton also believed if he entered into some such agreement the threats against him would cease ... with Armstrong." 40

(Further hearing adjourned until Thursday, 11th March, 1971, at 10.15 a.m.)